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No. 89-473

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

JAMES J. DOODY, et al.,
Petitioners,
vs.
SINALOA LAKE OWNERS ASSOCIATION, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This case involves property owners' claims that their real property was damaged by state officials wrongfully acting without adequate notice, under color of emergency authority, but in the absence of an emergency. Based on *Parratt* v. *Taylor,* 451 U.S. 527 (1981), *Hudson* v. *Palmer,* 468 U.S. 517 (1984), and *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson County,* 473 U.S. 172 (1985), the District Court dismissed the property owners' suit brought under 42 U.S.C. § 1983. The Ninth Circuit's reinstatement of the due process claims raises a number of issues concerning the ripeness of claims under the due process clause of the Fourteenth Amendment:

1. Whether a claim for a denial of procedural due process under the Fourteenth Amendment is ripe where state officials allegedly damaged private property while wrongfully acting under color of state emergency authority, without opportunity for a meaningful predeprivation hearing, although an adequate postdeprivation state law remedy exists.

2. Whether the allegation that state officials arbitrarily and unnecessarily damaged private property in wrongful exercise of state emergency authority, without advance notice to the property owners, is sufficient to state a claim for a denial of substantive due process, notwithstanding the availability of an adequate postdeprivation state remedy.

> [Petitioners do not base their petition for writ of certiorari on the following question, but respectfully reserve the right to argue the issue should the petition be granted.]

3. If some predeprivation process was required, where state officials allegedly damaged private property while wrongfully acting under authority of state emergency police power, did an informal court hearing obtained the same day by the property owners in an unsuccessful request for injunctive relief satisfy the requirements of the due process clause of the Fourteenth Amendment?

LIST OF PARTIES

Petitioners (Defendants and appellees in Court below)[1]:

James J. Doody, David J. Jacinto, J. E. Ley, S. S. McEwan, V. H. Persson, and Roger Stephenson.

Respondents (Plaintiffs and appellants in Court below):

Sinaloa Lake Owners Association, Inc., a California Corporation, Diantha Ain, Robert A. Ain, Ann Bellenson, Leonard Bellenson, Alvin Bennett, Edward T. Bergin, Ruth M. Bergin, Caryl Bigenho, Edward D. Bigenho, Junious W. Burrage, Pearl Burrage, Alan T. Canfield, Irene R. Canfield, Judith A. Goosen, Robert A. Goosen, Malcolm R. Harding, Patricia I. Harding, Janet H. Hayes, John B. Hayes, William Hill, Dorothy J. Hodson, William J. Hodson, Donna R. Hull, William J. Hull, Jr., C. R. Joshi, Rekha C. Joshi, Monica Kernberger, executor of the estate of H. R. Kernberger, Shirley E. Najemnik, Elaine D. Price, Richard D. Price, Jannice M. Schnetzler, Peter J. Schnetzler, Dianne Schultz, Fred N. Schultz, Jane M. Seaman, William A. Seaman, E. Dean Seymour, Josephine Seymour, Grace Sorrels, Mary Lou Sparks, Ronald J. Sparks, Janet M. Strathearn, David L. Strathearn, Jr., James Stutzman, Sandra Stutzman.

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[1]The petitioners were officials of the Division of Safety of Dams of the State of California Department of Water Resources at the time of the events in question (March, 1983). James Doody, now retired, was the DSOD Chief at the time. V. H. Perrson presently holds that position. David Jacinto, J. E. Ley and Roger Stephenson have since retired from state service. Mr. McEwan died in December, 1987. Like the petitioners, the City of Simi Valley and County of Ventura are defendants/appellees in the Court below, and are expected to file petitions for writ of certiorari as well. Donald G. Tudor and Jennie P. Tudor, cross-defendants in the District Court, are listed as appellees in the Ninth Circuit decision but did not participate in the proceedings in that Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners James J. Doody, S. S. McEwan, David J. Jacinto, J. E. Ley, V. H. Persson, and Roger Stephenson, present and former employees of the Division of Safety of Dams of the State of California Department of Water Resources, respectfully petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original decision of the United States Court of Appeals for the Ninth Circuit, dated January 6, 1989, is set forth in Appendix A, and was not reported prior to being amended. The first amended decision of the United States Court of Appeals for the Ninth Circuit, dated March 23, 1989, is published at 864 F.2d 1475, and is set forth in Appendix B. The second amended decision of the United States Court of Appeals for the Ninth Circuit,

dated August 9, 1989, denying the petition for rehearing, which is not yet reported, is set forth in Appendix C. The statement of decision of the United States District Court for the Central District of California, dated June 30, 1986, is set forth in Appendix D.

JURISDICTIONAL GROUNDS

The second amended decision of the United States Court of Appeals for the Ninth Circuit, denying the petition for rehearing and suggestion for rehearing en banc, was filed and entered on August 9, 1989, and is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS

1. United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. United States Constitution, Fourteenth Amendment, § 1:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

3. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

4. California Constitution, Article 1, § 19:

"Private property may be taken or damaged for public use only when just compensation . . . has first been paid . . . "

5. California Water Code, Division 3, Part 1, Chapters 1-4 (§§ 6000-6157)

(Reproduced in Appendix E)

STATEMENT OF THE CASE

1. Nature of the Controversy

Respondents are the owners of certain real property in the County of Ventura, State of California, that includes the site of Sinaloa Lake, a man-made lake created by an earthen dam built in the 1920's. The individual respondents, members of respondent Sinaloa Lake Owners Association (SLOA), are the owners of homes surrounding the lake and above the dam. Below the dam is a portion of the City of Simi Valley. In December, 1983, the respondents brought a civil rights suit against the petitioners, six officials of the Division of Safety of Dams (DSOD) of the State of California Department of Water Resources,[2] based on the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, related to the draining

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[2]The DSOD is responsible under State law (Cal. Water Code, Division 3, Part 1, Chapters 1-4 (§§ 6000-6157) for supervising and inspecting all dams and reservoirs in the State, other than those owned by the Federal Government.

of Sinaloa Lake and breaching of the dam on orders of the DSOD in March of 1983.

The facts, presented in the record through the second amended complaint (ER (Excerpts of Record) 12) and the parties' stipulated facts contained in the pre-trial conference order (ER 235A), can be summarized as follows: Heavy rains fell in and around Sinaloa Lake from February 25 to March 3, 1983. (SF (Stipulated Fact) 29, 36.) During this constant rain, the Lake began overflowing through the dam spillway. (ER 12, p. 7.) On March 2, 1983, two earth slides occurred on the face of Sinaloa Dam. (SF 30.) That evening, following a meeting with fire and law enforcement officials and representatives of SLOA, the City of Simi Valley and County of Ventura, because of the emergency situation, ordered evacuation of certain downstream residential areas, and began pumping water from the lake to reduce pressure on the dam. (SF 33-35.) The DSOD took control of the situation on March 3, 1983. (SF 37.) On March 4, 1983 the DSOD decided to completely drain the lake and breach the dam. (SF 41, 42.)[3] The next day, with the water level reduced by 10 to 12 feet from the high water mark, the City allowed downstream residents to return to their homes. (SF 46-47.) On March 6, Doody ordered the dam not be breached (SF 51), allegedly countermanding the prior decision. On March 7, the DSOD decided to proceed with work to modify the dam spillway. (SF 55.) On March 8, the water level was down 22 feet, and DSOD agreed to maintain the

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[3]The Ninth Circuit panel erroneously assumed that the purpose of breaching the dam was to drain the lake. (Appendix C, p. C-9.) However, as the District Court correctly inferred in its statement of decision, the purpose of breaching the dam was to prevent a catastrophic collapse of the dam in event of another storm refilling the lake. (Appendix D, p. D-3.)

water level to allow respondents to institute a "fish recovery program". (SF 61-62.) On March 10, the DSOD again decided to breach the dam. (ER 12, p. 13.) Respondents contend that they were not advised of this decision until March 11, the day the actual breaching of the dam was begun.

On March 11, 1983, the SLOA, represented by an attorney, prepared an application for a temporary restraining order against the breaching of the dam and secured an informal hearing with Presiding Judge William L. Peck of the County of Ventura Superior Court. (SF 71, 73.) At 4:00 p.m. that day, the SLOA attorney and an attorney for the State DSOD met with the Judge in chambers. Also present were two DSOD officials, petitioners James J. Doody and Roger Stephenson. Respondent Fred Schultz, the SLOA representative, was also present through part of the time. (SF 72.) The Court asked Mr. Schultz whether (1) SLOA had an expert who could testify that the dam was safe, and (2) whether he could personally provide indemnity to downstream property owners in event the lake were refilled by a new storm. After Schultz answered both questions in the negative, the Court denied the request for a restraining order. (SF 74, 75.) (Apparently, the SLOA's papers were not formally filed and no record of the proceeding was made.) The breaching of the dam was begun at 5:00 p.m. that evening (SF 77), and was completed by March 17. (ER 12, p. 14.) Prior to this incident, the DSOD had never breached a dam. (SF 79.)

Petitioners contend that the draining of the lake and breaching of the dam was performed under authority of California Water Code §§ 6110 and 6111, which permit DSOD in an emergency, to completely empty a reservoir or take "such other steps as may be essential to safeguard

life and property" when there is not "time for the issuance and enforcement of an order relative to maintenance or operation". (Appendix E, p. E-9.) Under California law, a property owner whose property has been taken or damaged for public use without compensation may institute an inverse condemnation action for damages. (*Holtz v. San Francisco Bay Area Rapid Transit District,* 17 Cal.3d 648, 652, 131 Cal.Rptr. 646 (1976), citing Cal. Constitution Article 1, § 19.)

2. Proceedings Below

The action was commenced in December of 1983. In their second amended complaint (ER 12), respondents alleged that petitioners breached the dam "although any supposed emergency was over by March 8, 1983" (*id.,* p. 12) and that the breaching of the dam constituted a taking of property without just compensation in violation of the Fifth Amendment, and in violation of their rights to procedural and substantive due process under the Fourteenth Amendment. Respondents also alleged a violation of the Fourth Amendment.

In May of 1986, petitioners filed a motion for judgment on the pleadings on grounds that, inter alia, respondents' claims were not ripe for adjudication since respondents had an available state remedy in inverse condemnation which they had not utilized. In June 1986, the District Court, relying largely on *Parratt v. Taylor,* 451 U.S. 527 (1981), *Hudson v. Palmer,* 468 U.S. 517 (1984), and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County,* 473 U.S. 172 (1985), granted the motions of petitioners and the other defendants City and County, and entered a dismissal of the action on June 30, 1986. The District Court concluded that the Fifth Amendment claim was not ripe under *Williamson County* because a state remedy for obtaining

"just compensation" was available under state law. The Court further concluded that the procedural due process claim was not ripe, pursuant to *Parratt v. Taylor,* due to the availability of a postdeprivation remedy under state law, and was further foreclosed by the hearing held on the property owners' March 11 request for injunctive relief. The Court also concluded that a substantive due process claim was not stated. The Court held that "[d]espite the important interests of the dam owners, the state's interest in averting a major disaster must be considered paramount, meaning a pre-deprivation hearing is not constitutionally required." (Appendix D, p. D-11.) Finally, the Court held that the plaintiffs did not state a claim under the Fourth Amendment.

Plaintiffs appealed to the Ninth Circuit U.S. Court of Appeals. On January 6, 1989 the Ninth Circuit affirmed the dismissal of the Fourth and Fifth Amendment claims, but reversed the dismissal of the Fourteenth Amendment due process claims. (The opinion is reproduced at Appendix A.) The Court amended the opinion sua sponte on March 23. In the amended opinion, published in the official reports (*Sinaloa Lake Owners Assn. v. City of Simi Valley,* 864 F.2d 1475 (9th Cir. 1989)), and reproduced at Appendix B, the Ninth Circuit held that the respondents' Fifth Amendment claim was not ripe, pursuant to *Williamson County,* as the plaintiffs had not exhausted their state remedy, which the Court agreed was adequate. However, the Court held that the respondents had stated viable procedural and substantive due process claims which were ripe for adjudication notwithstanding *Williamson County, Parratt,* and *Hudson.*

In reversing the dismissal of the due process claims, the court construed the contentions of the lake owners liberally, as was proper for it to do. The Court concluded that " . . . in the light most favorable to them, their allega-

tions paint a picture of government officials bent on destroying the dam for no legitimate reason and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes." (Appendix C, p. C-30.) The Court held that (1) the alleged failure of the DSOD to give advance notice of the decision to breach the dam, and lack of a meaningful predeprivation hearing stated a claim for a denial of procedural due process; (2) the "emergency action" exception to the general requirement of predeprivation process was not applicable since the emergency was allegedly over when the dam was breached; and (3) the allegations that the breaching of the dam was arbitrary and irrational stated a claim for a deprivation of substantive due process. The Court of Appeals concluded that the *Williamson County* ripeness rule was inapplicable to the due process claims, as opposed to the "just compensation" clause claim arising from the alleged taking. The Court also reasoned that the *Parratt* doctrine did not apply to this case since the wrongful conduct alleged did not involve "random and unauthorized acts" of a state employee, as in *Parratt*, but rather the decisions of senior policy-making officials of DSOD. (Appendix C, pp. C-19 - C-20.) The Court applied its prior en banc holding in *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985) (en banc)[4] to conclude that since the state has statutes designed to control the actions of state officials, and the DSOD officials were *"charged with carrying out state policy act under the apparent authority of those directives, it makes no sense to say either that their*

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[4]It is important to note that *Piatt* reflects the Ninth Circuit's interpretation of the limits of the *Parratt* doctrine imposed by the "established state procedures" exception to *Parratt* enunciated in *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 436 (1982).

conduct is 'random' or that it is impossible for the state to provide a hearing in advance of the deprivation. . . .". (Appendix A, p. A-15 - A-16, citing *Piatt*, 773 F.2d at 1036 (emphasis added).)

On January 20, 1989, petitioners filed a timely petition for rehearing and suggested a rehearing en banc. In the petition, the DSOD officials voiced the concern that the Court's ruling would allow claimants in most inverse condemnation cases to file § 1983 claims alleging procedural and substantive due process deprivations, in derogation of *Parratt* and its progeny. Petitioners asserted that the Court had misapplied the holding of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) in ruling that *Parratt* was inapplicable to the property owners' due process claim. Petitioners also urged the Court to rehear the case on the grounds that the decision was contrary to precedent and would have a chilling effect on legitimate exercise of state emergency power. The petition for rehearing also asked the Court to reconsider its adoption of a substantive due process standard distilled from *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973). Petitioners contended that this highly subjective standard was inconsistent with Supreme Court case law and was an open invitation to federalization of inverse condemnation litigation.[5]

Nevertheless, on August 9, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en

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[5]While the petition for rehearing was pending, the Supreme Court decided *Graham v. Connor*, 490 U.S. _____, 104 L.Ed.2d 443 (1989), which rejected application of the *Johnson v. Glick* substantive due process standard in a Fourth Amendment excessive force case.

banc, and issued a second amended opinion, which supersedes the amended opinion previously published. (Appendix C.) In the second amended opinion, the Court again rejected application of the *Parratt* ripeness doctrine and held that the "emergency action" exception to the general requirement of predeprivation process was inapplicable because the property owners claimed that the emergency was over when the DSOD officials acted. It is important to note that the decision acknowledged the decision in *Graham v. Connor,* 490 U.S. ___, 104 L.Ed.2d 443 (1989), but held that *Graham* did not preclude a substantive due process claim in a property taking case brought under the Fourteenth Amendment. (slip opn., n. 13, Appendix C, p. C-29.) The court explained that respondents' claim "goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them." (Slip opn., Appendix C, p. C-30.)

REASONS FOR GRANTING THE WRIT

I

IN REJECTING APPLICATION OF RIPENESS DOCTRINES TO DUE PROCESS CLAIMS ARISING OUT OF A PROPERTY TAKING, THE NINTH CIRCUIT HAS, WITHOUT JUSTIFICATION, OPENED THE DOOR TO THE FEDERALIZATION OF STATE INVERSE CONDEMNATION LITIGATION BY ENCOURAGING BOILERPLATE PLEADING OF DUE PROCESS CLAIMS IN PROPERTY-TAKING CASES

Petitioners seek certiorari to review this decision in which the Ninth Circuit has impliedly rendered the ripeness doctrines of *Parratt v. Taylor, Hudson v. Palmer,* and

Williamson County v. Hamilton Bank[6], *supra,* a nullity in the circuit. The Court has held that property owners aggrieved by an alleged "unnecessary" or "arbitrary" physical taking of property without adequate predeprivation notice and an opportunity for a meaningful hearing, may state independent causes of action under 42 U.S.C. § 1983 for deprivation of procedural and substantive due process, irrespective of the availability of an adequate state judicial remedy. Thus, the Court has essentially invited inverse condemnation claimants to file in federal court under § 1983.

Virtually every inverse condemnation action arguably contains a denial of procedural due process because inverse condemnation, by definition, involves exercise of state power without prior eminent domain or other predeprivation proceedings. Furthermore, as the District Court stated, every governmental act that damages property or impairs its value could be pleaded as a denial of "substantive due process" merely by a claim that in effect alleges that "the taking shocks the conscience". (Appendix D, p. D-9.) In reversing the lower court based on its apparent conclusion that the alleged "taking" of the dam "shocks the conscience" because of the DSOD officials' conduct, the Court of Appeals has also disregarded what other courts have recognized is the likelihood that such a holding " . . . would encourage litigants to try to circumvent the holdings in *Parratt* and *Hudson* by characterizing

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[6]In *Williamson County,* the Court held that a developer's Fifth Amendment claim was not ripe where he had not exhausted the available state remedy in inverse condemnation. While the Court did not have a due process claim before it, the Court's analogizing of *Parratt* in holding the just compensation claim unripe implies that the Court did not intend to suggest that a due process claim could proceed while the underlying claim for "just compensation" was not itself ripe due to the availability of a state remedy.

their claims as implicating substantive, rather than procedural, due process." (*Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988), citing *Schaper v. City of Huntsville*, 813 F.2d 709, 718 (5th Cir. 1987).) This is directly contrary to " . . . the policies underlying *Parratt* and subsequent cases — that is, the stated purpose of discouraging the use of section 1983 as a supertort remedy to supplant existing state remedy procedures." (*Easter House v. Felder*, 879 F.2d 1458, 1470 (7th Cir. 1989) (en banc).)

Under this decision, artful pleading would insure that a property taking case could be litigated in federal court under 42 U.S.C. § 1983 so long as the "taking" were physical or the result of a final regulatory decision.[7] As *Kauth, Schaper, Easter House,* and additional decisions of other circuits discussed below suggest, in every case where a "taking" of property was accomplished without formal eminent domain proceedings, allegations that the taking resulted from arbitrary, irrational, or even conspiratorial actions of government officials can easily be made. Thus, under this decision, such allegations would insulate complaints in property cases from a pre-trial motion to dismiss based on lack of ripeness of the underlying claim for "just compensation", forcing the federal courts repeatedly to be triers of fact concerning the justification for government action, despite available state remedies. Furthermore, the Ninth Circuit has virtually instructed

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[7]Since the Supreme Court has recently confirmed that zoning or similar property-use restrictions can in some circumstances constitute a compensable "taking" under the Fifth Amendment (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. _____, 107 S.Ct. 2378, 2389 (1987), the Ninth Circuit's decision opens the door to vast numbers of § 1983 suits by forum-shopping property owners asserting due process claims as well as claims for "just compensation" for the underlying "taking".

future litigants to avoid the *Williamson County* requirement that the property owner exhaust the state remedy before asserting a Fifth Amendment "taking claim" by suggesting that such a claim be asserted as a pendant cause of action to a due process claim under § 1983 (Appendix C, p. C-16, fn. 4.).[8] The inevitable result will be an explosion of inverse condemnation and similar property taking cases being litigated in the guise of due process claims under section 1983 in the Ninth Circuit and in other circuits which follow its lead. This could not have been what the Supreme Court intended in deciding *Parratt,* and analogizing its logic to the ripeness issue in *Williamson County.*

II

THE NINTH CIRCUIT'S NARROW READING OF *PARRATT* AND ITS PROGENY IS IN FUNDAMENTAL CONFLICT WITH THE IMPORTANT POLICY CONSIDERATIONS RECOGNIZED BY THIS COURT

A. The Ninth Circuit Has Erroneously Narrowed *Parratt*

In *Parratt v. Taylor,* 451 U.S. 527 (1981), this Court held that a claim for a deprivation of due process arising from the negligent loss of a prisoner's property by prison staff could not be stated where there was an adequate postdeprivation state remedy where the loss was the " . . .

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[8]While the Ninth Circuit indicated that respondents should be given leave to amend to add this pendant claim due to the alleged delay by petitioners in raising the ripeness issue, there is no reason why all aggrieved property owners could not initially include the "taking" claim as a pendant cause of action to the due process claims brought under § 1983.

result of a random and unauthorized act by a state employee . . . " rather than " . . . some established state procedure . . . ". (451 U.S. at 541.) Subsequently, in *Hudson v. Palmer,* 468 U.S. 517 (1984), the Court expanded *Parratt* to an intentional destruction of property. The *Hudson* Court stated:

> "We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." (468 U.S. at 533.)

The Court further rejected the claimant's argument that since a state employee who intentionally destroys property " 'can provide predeprivation process, then as a matter of due process he must do so.' " The Court explained:

> "This argument reflects a fundamental misunderstanding of *Parratt.* There we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process." (468 U.S. at 534.)

Here, the Ninth Circuit has reversed the District Court's dismissal of respondents' due process claim based upon the same "fundamental misunderstanding of *Parratt*". In rejecting its application, the Ninth Circuit has restricted the *Parratt* doctrine to an extent unsupported

by the Supreme Court's holdings and in conflict with the interpretation accorded by other Circuits. (See *infra.*)

The Ninth Circuit's conclusion that the principles enunciated in *Parratt* do not apply to the respondents' procedural due process claims rests heavily upon the Ninth Circuit's earlier en banc interpretation of the limits placed on *Parratt* by *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). (Appendix C, pp. C-19 - C-20, citing *Piatt v. MacDougall,* 773 F.2d 1032 (9th Cir. 1985) (en banc).) As noted in *Hudson, Logan* held that post deprivation remedies do not satisfy due process where the deprivation is the result of an "established state procedure". (468 U.S. at 532, n. 13.) Unlike *Parratt,* the *Logan* case involved a plaintiff's challenge not only to a state employee's error, but also "... the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." (455 U.S. at 436.) The *Logan* Court thus concluded that plaintiff's rights were infringed by "... the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference...." (*Ibid.*)

In this case, *Logan* is simply inapplicable. Assuming that the DSOD officials breached Sinaloa Dam in the absence of any justifying emergency, there is still no "established state policy" at issue in addition to the wrongful acts of individual state employees, even if their acts amounted to a conspiracy. California law authorizes such emergency action only where it is "essential to safeguard life and property", and there is not time for issuance of an administrative or judicial order. (Cal. Water Code §§ 6110, 6111, Appendix E, p. E-9.) Thus, if respondents' allegations are true, the DSOD officials violated state law. Respondents have challenged *no* stat-

ute, ordinance, regulation or established policy. To the contrary, the parties have stipulated that *the DSOD had never breached a dam before Sinaloa Dam.* (SF 79, ER 235A.) The breaching of Sinaloa Dam was a fundamentally discretionary decision by DSOD officials acting in what indisputably *began* as an emergency situation, requiring the evacuation of hundreds of downstream residents, although respondents allege the emergency was over at the time of the actual breaching of the dam. The emergency powers established in the Water Code are not intended to cause, and do not themselves contemplate, the deprivation of any protected interest, and thus cannot serve as an "established state procedure" for purposes of *Logan.* (See *Rittenhouse v. DeKalb County,* 764 F.2d 1451, 1455 (11th Cir. 1985).)

The Ninth Circuit decision points to no state statute, regulation, or *established* state procedure, which was used to deprive petitioners of their property, *and* extinguish their ability to challenge that deprivation in state court, as was the case in *Logan.* Instead, the Court has focused on the employment status of the petitioners, which does include high-level DSOD officials. As will be discussed, this focus is fundamentally in error and in conflict with other circuit decisions.

B. The Holding that Further Predeprivation Process Was Required Has Established a Vague Due Process Standard that Will Have a Chilling Effect on Legitimate Exercise of State Emergency Power

In holding that the respondents have alleged a ripe procedural due process claim, the Ninth Circuit has set a dangerous precedent that will hinder virtually all state and local government emergency action concerning private property by allowing aggrieved property owners to

seek compensation for property damage under the rubric of procedural due process, even where the state's procedural safeguards are adequate, as here.

The present decision states that the respondents were denied their Fourteenth Amendment right to "notice and an opportunity for a hearing, however abbreviated" (Appendix C, pp. C-21-C-22), yet concludes that the hearing that was held on the application for a temporary restraining order did not suffice in light of the need for technical data on the safety of the dam, the DSOD's delay in advising SLOA of the plan to breach the dam, and the alleged absence of a true emergency. The Ninth Circuit has therefore given little guidance to state emergency officials and in fact sown confusion by permitting liability for a constitutional tort under § 1983 without providing an articulatable standard of what notice and predeprivation process is required where emergency powers are implemented that could result in property damage.

While recognizing the need to allow governmental officials to act promptly and decisively when they perceive an emergency (Appendix C, p. C-20), the Court nonetheless has given short shrift to this concern by essentially holding that where the existence of an emergency is disputed, the postdeprivation remedy is irrelevant in a § 1983 suit. The Court's logic is circular — the Court in effect concludes that because the property owners allege that there really was no emergency, a predeprivation hearing was required even though it is agreed the DSOD was acting under color of emergency authority, which authority, by definition does *not* require such a hearing before it can be exercised. This result is directly contrary to public policy expressed by the Supreme Court.

The Court has repeatedly upheld against constitutional challenge exercise of the state police power to protect

public health via summary seizure or destruction of property. (See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264 (1981) [summary cessation orders to mine operators]; *Calero-Toldeo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) [summary seizure and forfeiture of yacht used by lessee to transport contraband]; *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) [seizure and destruction of unwholesome food]; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) [seizure of misbranded drugs]; *Lawton v. Steele*, 152 U.S. 133 (1894) [seizure and destruction of nets used in violation of fishing laws].)

In *Hodel, supra,* the Court considered a due process attack on a provision in the Surface Mining Act (30 U.S.C. §§ 1201 et seq.) which permitted administrative cessation orders to mine operators without prior hearing, although such orders could and did result in substantial financial losses. In upholding the provision, the Court noted:

> " 'Discretion of any official action may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. *It is sufficient, where only property rights are concerned,* that there is at some stage an opportunity for a hearing and a judicial determination.' " (emphasis added.) (452 U.S. at 303, citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950).)

The *Hodel* Court concluded that the opportunity for postdeprivation administrative hearings and judicial review was sufficient to "comport with the requirements of due process". (*Ibid.*) Significantly, the Court rejected the contention that the possibility of incorrect cessation orders issuing rendered the Act subject to due process challenge: "The relevant inquiry is not whether a cessa-

tion order should have been issued in a particular case, but whether the statutory procedure itself is incapable of affording due process." (452 U.S. at 302.)

In this case, the statutes under which petitioners were acting, California Water Code §§ 6110 and 6111, limited the circumstances under which they could so act to where action was "essential to safeguard life and property" and time was insufficient to allow issuance of an administrative order to the property owner. This is at least as specific as the standards which have been previously upheld by the Supreme Court. (See *Hodel, supra,* 452 U.S. at 301-302, citing cases.) Furthermore, as even the Ninth Circuit decision recognized, California law does recognize a right to litigate an inverse condemnation claim related to summary destruction of property where the emergency justification is in dispute.[9]

Should this decision stand, government officials in the Ninth Circuit could be faced with a plethora of § 1983 suits every time they took action in an apparent emergency that resulted in property damage. The responsibilities of state officers faced with weighing the public interest with individual rights on a daily basis are great enough without allowing this additional intolerable burden.

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[9]See e.g., *Rose v. City of Coalinga,* 190 Cal.App.3d 1627, 236 Cal.Rptr. 124 (1987) [whether compensation was required for allegedly unjustified destruction of plaintiff's building by the city after an earthquake, on grounds the building presented a public nuisance, was a question of fact not resolvable against claimant on a summary judgment motion.]

C. The Decision Conflicts With Holdings of Other Circuits Which Have Applied *Parratt* to Cases of this Nature

The present decision, it should be noted, is the most disturbing recent entry into a quagmire of confusion among the circuits concerning the application of *Parratt.* Several circuits would apparently apply *Parratt* to all due process claims, whether "procedural" or "substantive" (e.g., *Collier v. City of Springdale,* 733 F.2d 1311, 1315 (8th Cir. 1984) [affirming dismissal of both apparent procedural and substantive due process claims related to damage to property caused by sewer discharges made in accordance with established state procedures, where an adequate postdeprivation remedy was available]; see also *Wadhams v. Procunier,* 772 F.2d 75, 77-78 (4th Cir. 1985); *Holloway v. Walker,* 790 F.2d 1170, 1172-1173 (5th Cir. 1986), cert. den. 479 U.S. 984), while others have applied *Parratt* where the procedural due process deprivation is of property rather than liberty. (e.g., *National Communications System, Inc. v. Michigan Public Service,* 789 F.2d 370, 372 (6th Cir. 1986), cert. den. 469 U.S. 857 [holding that in property deprivation cases, the plaintiff "must attack the state's corrective procedure as well as the substantive wrong"].) Other courts have declined to apply *Parratt* where the deprivation is of substantive due process. (e.g., *Augustine v. Doe,* 740 F.2d 322, 325-27 (5th Cir. 1984).) No circuit, however, has gone as far as has the Ninth Circuit in the present case in minimizing the importance of state law remedies in determining whether a due process claim is ripe in a property taking case.

The Ninth Circuit's holding that the fact the petitioners were "senior DSOD officials", acting under color of DSOD's statutory authority, precludes their wrongful intentional acts from being termed "random and unautho-

rized" for purposes of *Parratt* has been rejected by most other circuits. (*Easter House v. Felder,* 879 F.2d 1458, 1472 (7th Cir. 1989) (en banc); *Birkenholz v. Sluyter,* 857 F.2d 1214, 1217 (8th Cir. 1988), U.S. App. pend.; *Fields v. Durham,* 856 F.2d 655, 657 (4th Cir. 1988); *Yates v. Jamison,* 782 F.2d 1182, 1184-1185 (4th Cir. 1986)[10]; *Holloway v. Walker,* 790 F.2d 1170, 1173-1174 (5th Cir. 1986), cert. den. 479 U.S. 984.) In particular, the en banc holding in *Easter House, supra,* demonstrates the flawed logic of the Ninth Circuit opinion and the widespread conflict among the circuits over the interpretation of *Parratt.*

In *Easter House,* a private adoption agency alleged that several high level officials of the Illinois state child welfare agency had, in a conspiracy, used the state's licencing apparatus in an effort to put *Easter House* out of business. The trial court entered judgment for *Easter House,* finding that the defendants had deprived the adoption agency of its property interest without due process of law. In an opinion which highlights the conflict among the circuits, the en banc Court held that *Easter House* "... cannot maintain a section 1983 action in light of the Supreme Court's pronouncements in *Parratt* and its progeny." (p. 1474.) The Court concluded that while the state officials were empowered to exercise discretion and required to afford due process to licensees, the ultimate policymaker was the state legislature, and a deviation from that policy even by a high ranking official, nevertheless was "random and unauthorized" conduct. The Court stated: "... we refuse to hold that *Parratt* and its progeny do not apply in cases involving a 'high-ranking' state or

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[10]In *Yates,* the Court held that *Parratt* applied, although the plaintiff alleged that high level city officials had ordered his home demolished as a nuisance, without notice or hearing.

local official's failure to provide the due process protection when that official has the authority and duty to do so." (p. 1472.)[11] It is important to stress that in *Easter House,* the wrongful conduct alleged went beyond mere allegations; a jury had in fact apparently accepted the claim that a concerted conspiracy had existed among these high level officials to destroy the plaintiffs' property rights. Despite these facts, at least as egregious as the allegations in the present case, the Seventh Circuit applied *Parratt* based on ". . . the stated purpose of discouraging the use of section 1983 as a supertort remedy to supplant existing state remedial procedures." (p. 1470.)

Similarly here, the State only grants discretion to DSOD to "take any action essential to protect life and property" when there is a true emergency and not time to issue a reviewable administrative order. (Cal. Water Code §§ 6110, 6111 [Appendix E, p. E-9.]) If the officials, as alleged, acted in the absence of an emergency, this was contrary to state law and their action could not have been foreseen by the *state* itself in time to provide predeprivation due process. Under the Seventh Circuit analysis in *Easter House,* the DSOD officials' conduct was "random and unauthorized" conduct under *Parratt* and *Hudson,* and therefore did not amount to a deprivation of property "without due process of law". The lake owners would only have a ripe due process claim if and when the *state* denied them postdeprivation due process and opportunity to obtain compensation, which is not the case here.

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[11]Ironically, in his dissenting opinion, Judge Cudahy cited the Ninth Circuit's decision in *Sinaloa Lake* in support of his interpretation of *Parratt.* Judge Cudahy concluded that the en banc decision "exacerbates (if it does not create) a circuit conflict, suggesting that the Supreme Court will be called upon to visit this murky area of the law yet again." (p. 1483, n.3.)

As suggested by the recent grants of certiorari in *Zinermon v. Burch,* No. 87-1965, and *Washington v. Harper,* No. 88-599, this Court's intervention is appropriate to resolve this conflict among the circuits, which has since been greatly magnified by the Ninth Circuit's anomalous decision.

III

THE NINTH CIRCUIT HAS ERRONEOUSLY ANNOUNCED A VAGUE NEW SUBSTANTIVE DUE PROCESS THEORY OF LIABILITY OF GOVERNMENT OFFICIALS IN PROPERTY TAKING CASES, INCONSISTENT WITH RECENT SUPREME COURT PRECEDENT AND OTHER CIRCUIT DECISIONS

A. The Ninth Circuit's Substantive Due Process Analysis is Irreconcilable With *Graham v. Connor*

In *Graham v. Connor,* 490 U.S. ____, 104 L.Ed.2d 443 (1989), the Court held that a § 1983 claim alleging excessive force in an arrest should be analyzed under the specific constitutional provisions implicated, (i.e., the Fourth Amendment), rather than as a violation of substantive due process. The Court therefore disapproved of the lower court's reliance on the *Johnson v. Glick* balancing test, which considered:

> "(1) the need for application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) '[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.' " (104 L.Ed.2d at 451.)

As the *Graham* Court noted, this standard had been adopted by " . . . the vast majority of lower federal courts . . . ". (104 L.Ed.2d at 453.) However, the Court rejected the use of this test, reaffirming that the ". . . first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged' " and that the " . . . validity of the claim *must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard.*" (emphasis added) (490 U.S. at ____; 104 L.Ed.2d at 454, citing *Baker v. McCollan,* 443 U.S. 137 (1979) and *Tennessee v. Garner,* 471 U.S. 1, 7-22 (1985).) The *Graham* Court criticized the lower court's viewing the § 1983 claim based on " . . . the more generalized notion of 'substantive due process' . . . " (104 L.Ed.2d at 454-455) rather than the " . . . two most textually obvious sources of constitutional protection against physically abusive government conduct." (104 L.Ed.2d at 453.)

The respondents' claim here is analogous to that of excessive force in *Graham,* in that they essentially claim the DSOD officials wrongfully used their emergency authority to breach Sinaloa Dam in the absence of a true exigency. The Ninth Circuit, in declining to apply *Graham* (See slip opn., fn. 10, Appendix C, pp. C-26 - C-27) in this property "taking" case, is ironically, and erroneously, according a *higher* standard of constitutional protection to property rights than the Supreme Court has accorded to the fundamental personal liberty interest implicated in *Graham.* The logic of *Graham* should apply to claims of abusive conduct involving other constitutional provisions such as the protection of property rights contained in the

Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.[12]

However, the Ninth Circuit has clearly rejected this result in adopting a substantive due process test that includes:

> "... such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm." (slip opn., citing *Johnson v. Glick*, Appendix C, p. C-28.)

Thus, the Ninth Circuit has resurrected the highly subjective and discredited *Johnson v. Glick* test to reverse the District Court's dismissal of the respondents' substantive due process claim. This anomalous result clearly conflicts with the Supreme Court's mandate in *Graham*.

B. The Decision Magnifies a Circuit Conflict

The Ninth Circuit's position is inconsistent with that of other circuits, which have rejected attempts to plead substantive due process claims where the underlying claim was remediable under state law. For example, in *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 515-16 (1st Cir. 1987) the Court held that where an

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[12]Since the Fifth Amendment itself contains a due process clause virtually identical to that of the Fourteenth Amendment, and the Fifth Amendment has not been interpreted to require pre-taking compensation (*Williamson County, supra*, 473 U.S. at 194-195), it simply makes no sense to conclude, as the Ninth Circuit apparently has, that a taking of property without pre-taking process or notice is not an unconstitutional "taking" if a state remedy is available, but that such a taking is nevertheless a substantive due process violation under the Fourteenth Amendment, irrespective of an available postdeprivation state remedy.

adequate state remedy exists for a taking of property, there can be no *substantive* due process violation under the Fourteenth Amendment. Similarly, in *Schaper v. City of Huntsville,* 813 F.2d 709, 718 (5th Cir. 1987) the Court, citing *Williamson County,* rejected a substantive due process claim based on an arbitrary employment dismissal on the ground that it "mirrored" the unripe procedural due process claim, and that allowing a separate substantive due process claim would "eviscerate *Parratt*". Furthermore, in *Kauth v. Hartford Ins. Co. of Illinois,* 852 F.2d 951, 957 (7th Cir. 1988), the Court, citing *Schaper,* held that substantive due process does not protect state-created property rights. Noting that the Supreme Court has never held that a deprivation of property is sufficient to state a substantive due process claim, the *Kauth* court concluded that if it were to hold otherwise, " . . . we would encourage litigants to try to circumvent the holdings in *Parratt* and *Hudson* by characterizing their claims as implicating substantive, rather than procedural, due process." (*Ibid.*) As the Eighth Circuit aptly noted in *Collier v. City of Springdale,* 733 F.2d 1311, 1317 (8th Cir. 1984), cert. den. 469 U.S. 857, in concluding apparent procedural and substantive due process claims were not ripe:

> " . . . [t]o assume jurisdiction in a case of this type would mean the opening of a floodgate to a multiplicity of federal actions involving all aspects of state eminent domain proceedings which in truth should be adjudicated under state procedures and in state forums."

The Supreme Court should intervene before other courts fail to heed this warning and follow the flawed decision of the Ninth Circuit.

CONCLUSION

Petitioners respectfully submit that the present decision is inconsistent with the language and intent of *Parratt, Hudson, Williamson County,* and their progeny. The decision dramatically expands the scope of "procedural" and "substantive due process" under 42 U.S.C. § 1983, and blurs the line between state tort remedies and the Civil Rights Act at the expense of the flexibility of state police power. By allowing all aggrieved property owners to seek redress under § 1983 for what they consider, "arbitrary" or "unnecessary" infringements on their property rights, the decision will almost certainly result in federalizing inverse condemnation litigation in the Ninth Circuit and other circuits which adopt its reasoning. Supreme Court review is therefore essential to decide whether this result is a desired or appropriate outcome in light of the purpose and intent of 42 U.S.C. § 1983 and the prior decisions of the Supreme Court.

Dated: September 20, 1989

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINALOA LAKE OWNERS ASSOCIATION, et al.,
Plaintiffs/Appellants,

v.

CITY OF SIMI VALLEY,
Defendant/Appellee,

JAMES DOODY, et al.,
Defendants-cross-defendants/Appellees,

v.

DONALD G. TUDOR; JENNIE P. TUDOR, et al.,
Third-party-defendants/Appellees,

COUNTY OF VENTURA,
Defendant-third-party-plaintiff/cross-claimant.

No. 86-6425

D.C. No. CV-83-8220-ER

OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
April 5, 1988 — Pasadena, California

Filed January 6, 1989

Before: Melvin Brunetti, Alex Kozinski and
David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Constitutional Law

Appeal from judgment on the pleadings finding the case not ripe for decision in a 42 U.S.C. § 1983 suit alleging deprivation of fourth, fifth, and fourteenth amendment rights. Affirming the taking and fourth amendment claims, the court reversed and remanded the procedural and substantive due process claims holding that the government violated plaintiff's due process rights by failing to provide an opportunity for a hearing and by shrouding its decision in secrecy and deception precluded plaintiffs from taking advantage of available legal processes.

This case arises out of the Division Chief of the California Division of Safety of Dams (DSOD) defendant James Doody's decision to breach plaintiffs', Sinaloa Lake Owners Association, apparently unsafe dam. The dam was breached after plaintiffs were unsuccessful in obtaining a temporary restraining order. Plaintiffs filed suit under 42 U.S.C. § 1983 alleging deprivation of their fourth, fifth and fourteenth amendment rights. Defendants successfully moved for judgment on the pleadings, claiming that the case was not ripe for decision.

[1] In light of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of. [2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial. They offer nothing, however, to substantiate this claim. [3] Nor is the court swayed by the alleged "reluctance of the California State Court system to lend a sympathetic ear to private property owners in

just compensation cases." [4] This court rejected defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. [5] Accepting plaintiffs' allegations as true, there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process. [6] After concluding that plaintiffs' substantive due process claim was ripe, [7] the court concluded that plaintiffs stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes. While defendants dispute these charges, this dispute cannot be resolved on a motion for judgment on the pleadings. [8] Finally, plaintiffs' taking claim under the fourth amendment is precluded by *Cassettari v. County of Nevada,* 824 F.2d 735, where this court stated that a claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments. The claim is unripe under *Williamson County.*

COUNSEL

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Walter G. Mortensen, Spray, Gould & Bowers, Ventura, California, for the defendant-appellee County of Ventura.

Henry J. Walsh and Carol A. Woo, Lawler, Bonham & Walsh, Ventura, California, for the defendant-appellee City of Simi Valley.

Joel A. Davis, Deputy Attorney General, Los Angeles, California, for the defendants-appellees Doody, Persson, Jacinto, Ley, Stephenson and McEwan.

OPINION

KOZINSKI, Circuit Judge:

We consider whether plaintiffs' fourth, fifth and fourteenth amendment claims are ripe for adjudication in federal court despite failure to exhaust state judicial remedies.

Facts

The complaint and stipulations of the parties set forth the following scenario:[1] Plaintiff Sinaloa Lake Owners Association owns Sinaloa Dam and Sinaloa Lake, the lake behind the dam. The individual plaintiffs own property surrounding the lake. The lake and the dam are located within the County of Ventura, outside the City of Simi Valley.

The California Division of Safety of Dams (DSOD), a division of the California Department of Water Resources, is responsible for inspecting non-federally owned dams in California. On February 11, 1983, after conducting an inspection of Sinaloa Dam, DSOD sent a letter to James Stutzman, former president of the Association, directing the Association to take certain corrective

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[1]We treat the parties' stipulations as pro tanto amendments of the pleadings.

actions and report back to DSOD no later than March 15, 1983.

Between February 25 and March 3, heavy rains raised the water level of Sinaloa Lake. On March 2, there were two slides on the face of the dam. Plaintiffs allege that these slides were caused by (1) a leak in a city-owned high-pressure water pipe running through the dam; (2) the county's actions in raising the dam's spillway, which allowed more water to accumulate behind the dam; and (3) the heavy rains. City officials immediately evacuated residents living below the dam and began pumping water out of the lake.

On March 3, defendant David Jacinto, a DSOD Associate Field Engineer, arrived at the dam and assumed control of the situation. He took additional steps to reduce the water level behind the dam. The Army Corps of Engineers inspected the dam and concluded it was stable.

On March 4, without advising plaintiffs, DSOD officials decided to breach the dam in order to drain the lake; this decision was not implemented immediately. By the next day, the water level was 10 to 12 feet below the high water mark. The city decided that the emergency was over, and advised evacuated residents to return to their homes.

On March 6, defendant James Doody, Division Chief of DSOD, countermanded the decision to breach the dam, and instead ordered workers to proceed with plans to lower the spillway. By March 8 the emergency was over: The water level was down 22 feet and DSOD promised to maintain that level to enable the Association to maintain fish in the lake.

On March 10, at the direction of DSOD, workers began lowering the spillway in order to reduce the risk of future problems. By that time, however, defendant Doody and

other senior officials of DSOD had once again decided to breach the dam. The plaintiffs were not advised of the latest decision until a few hours before DSOD contractors were scheduled to begin breaching the dam at 4:00 p.m. on Friday, March 11.

In an attempt to obtain a temporary restraining order, plaintiffs secured an informal hearing before a Superior Court Judge that afternoon. The judge refused to act, however, because plaintiffs were unable to produce a completed engineering study or testimony from an engineer showing that the dam was safe. DSOD produced no evidence indicating that the dam was unsafe. No order was entered and no record was made of the in-camera proceedings; apparently the matter was not even assigned a case number. Immediately after the hearing, DSOD's contractors breached the dam, lowered the water level 25 feet from the high water mark, and drained 90 percent of the water from Sinaloa Lake.

Plaintiffs filed suit under 42 U.S.C. § 1983 on December 16, 1983, alleging deprivation of their fourth, fifth and fourteenth amendment rights. Their second amended complaint was filed on July 2, 1984. On May 15, 1986, a month before the case was scheduled to go to trial, defendants moved for judgment on the pleadings, claiming that the case was not ripe for decision. The district court granted the motion as to all defendants. After their motion to amend the judgment was denied, plaintiffs timely appealed.

Discussion

We review the district court's grant of judgment on the pleadings de novo, taking all material allegations of the non-moving party as true and construing them in the light most favorable to that party. Judgment on the pleadings

will not be granted unless "the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 604 (1969). Motions for judgment on the pleadings, like motions to dismiss for failure to state a claim, must be viewed with particular skepticism in cases involving claims of inverse condemnation. *See Hall* v. *City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 1120 (1988).

I

Plaintiffs claim that defendants' actions in breaching the dam and destroying the lake amounted to a taking of their property without just compensation, in violation of the fifth amendment. Defendants argue, and the district court held, that this claim is not ripe because plaintiffs have failed to exhaust their state remedies.

Defendants rely on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985), which places two hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. First, *Williamson County* affirmed the principle that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. As we held in *Hall,* however, *Williamson County's* final decision requirement is inapplicable in cases of physical invasion. 833 F.2d at 1282 n.28. A physical taking, such as the one at issue here, is by definition a final decision, and thereby satisfies *Williamson County's* first exhaustion requirement.

The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194-95. The Court reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation. *Id.*

Plaintiffs, citing footnote 28 of *Hall*, contend that the second requirement of *Williamson County* is also inapplicable to physical invasion cases. That footnote, however, only relieves plaintiffs of the obligation to exhaust administrative remedies in physical taking cases — it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.

Contrary to plaintiffs' assertions, this interpretation of *Hall* does not conflict with *Williamson County*. *Williamson County* only requires exhaustion of state judicial remedies when the state provides "an adequate process for obtaining compensation." 473 U.S. at 194. Plaintiffs need not bring a state court action when it would be futile under existing state law. *Williamson County*, 473 U.S. at 196-97; *Kinzli* v. *City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988); *Furey* v. *City of Sacramento*, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986). Although the alleged taking in *Hall* amounted to a physical invasion, it was effected by a city ordinance. At the time the ordinance was passed, no action for inverse condemnation based on a regulatory taking could be brought under California law; the landowner's sole rem-

edy was to seek invalidation of the offending statute. *See Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 274-77, 598 P.2d 25, 29-31, 157 Cal. Rptr. 372, 376-78 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980); *see also Furey,* 780 F.2d at 1450 n.1. Although the Supreme Court later expressly disapproved this aspect of California law, *see First English Evangelical Lutheran Church* v. *County of Los Angeles,* 107 S. Ct. 2378, 2387 (1987), the appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs. *See Williamson,* 473 U.S. at 194 ("all that is required is that a '"reasonable, certain and adequate provision for obtaining compensation"' exist *at the time of the taking*") (emphasis added; citations omitted).

[1] Unlike *Hall,* the taking here was effected by direct governmental action, not by an ordinance. California law has long provided a damages remedy for this type of taking claim. *See Holtz* v. *San Francisco Bay Area Rapid Transit Dist.,* 17 Cal. 3d 648, 652, 552 P.2d 430, 433, 131 Cal. Rptr. 646, 649 (1976); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d 1627, 1633-35, 236 Cal. Rptr. 124, 127-29 (1987). Thus, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of.

[2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial, and because of what they suggest is the California courts' longstanding hostility toward taking claims. They offer nothing to substantiate their claim that they will suffer unreasonable delay in state court, other than the bare assertion that their case would not go to trial for four years or more. Such a generalized assertion falls far short of the evidence needed to show the futility of resorting to state courts for relief. Indeed, the published available data seems to paint a different picture. According to

information provided by the Ventura County Superior Court to the Judicial Council of California, the median time between the filing of a complaint and trial in civil non-jury cases in 1987 was less than three years. *See* Letter from Jay S. Widdows, Administrative Assistant, Ventura County Superior Court, to Alex Kozinski, Circuit Judge (July 22, 1988) (attaching data on median length of time for complaint-to-trial and at-issue memorandum-to-trial in Ventura County Superior Court).[2] Moreover, the time from filing to trial is not a particularly helpful measure of delay in a state like California, which allows a plaintiff up to three years from date of filing to effect service. Cal. Civ. Proc. Code § 583.210 (West Supp. 1988). A more meaningful measure of delay is the time between the filing of the at-issue memorandum and trial, since filing of the at-issue memorandum places the matter on the civil active list. Cal. Super. Ct. R. 209 (West Supp. 1988). That period was less than 8 months for civil nonjury trials and less than 10 months for civil jury trials in Ventura Country in 1987. We cannot say that this delay is so excessive as to render resort to the state court system futile.

[3] Nor are we swayed by the alleged "reluctance of the California State Court system to lend a sympathetic ear to private property owners in just compensation cases." Appellants' Opening Brief at 29. California courts have held on similar facts that property owners are entitled to present their claims for just compensation to a jury. *See, e.g., Archer* v. *City of Los Angeles,* 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941) ("[i]n certain circumstances . . . the taking or damaging of private property [to safeguard public health, safety or morals] is not prompted by so

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[2]We take judicial notice of these figures, contained in the reports of a public body, pursuant to Fed. R. Evid. 201(b)(2).

great a necessity as to be justified without proper compensation to the owner"); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d at 1635-36, 236 Cal. Rptr. at 128-29 (dispute over existence of emergency warranting destruction of private property and over grant of consent by owners to that act required dismissal of summary judgment); *Leppo* v. *City of Petaluma,* 20 Cal. App. 3d 711, 719, 97 Cal. Rptr. 840, 844 (1971) (damages appropriate where city failed to establish evidence of emergency justifying destruction of building). Plaintiffs do not explain why they fear that right will be denied them. We conclude that California provides plaintiffs an adequate procedure for obtaining just compensation.

Finally, plaintiffs assert that defendants are barred by laches from raising *Williamson County* as a defense.[3] Defendants respond that laches cannot bar their *Williamson County* defense because the failure to seek compensation in state court renders the taking claim unripe, and

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[3]Plaintiffs filed this lawsuit in December 1983, yet it was not until May 1986, one month before trial was to begin, that defendants first raised a ripeness challenge. It is clear they knew from the beginning that plaintiffs had not exhausted their state compensation remedies. Moreover, even before *Williamson County* was decided in June 1985, defendants were on notice that claims under the just compensation clause were not ripe until available state compensation remedies had been exhausted. *See Williamson County,* 473 U.S. at 194-95 (citing *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1013, 1018 n.21 (1984)).

The district court also expressed concern about this delay:

> [N]one of the defendants had ever moved to question the propriety of the case being here [in federal court] until here we are about one week before trial. I consider that to be dilatory and not in the best interest of the clients, necessarily. This request should have been raised at the outset in this case.

Reporter's Transcript, June 16, 1986, at 1-2.

lack of ripeness deprives the court of subject matter jurisdiction. *See Austin* v. *City and County of Honolulu,* 840 F.2d 678, 682 (9th Cir. 1988). We agree with defendants that ripeness is a jurisdictional requirement and lack of subject matter jurisdiction may not be waived.[4]

II

The due process clause protects individuals against governmental deprivations of property without due process of law. U.S. Const. amend. XIV, § 1. Plaintiffs contend that the DSOD's actions in breaching the dam and destroying the lake without providing plaintiffs adequate notice or a hearing amounted to a violation of due process.

[4] A. As a threshold matter, we reject defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. This requiremnent, derived from "the special nature of the Just Compensation Clause," 473 U.S. at 196 n. 14, states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking; it has no application to other types of constitutional claims, even where those claims arise out of facts that also give rise to a taking claim.

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[4]Although plaintiffs' taking claim is not ripe for our review, it would be entirely appropriate on remand for the district court, in the interest of judicial economy and particularly in view of defendants' undue delay in raising *Williamson County, see* n.3 *supra,* to permit plaintiffs to amend their complaint to include a pendent state law taking claim. *See, e.g., Rose* v. *City of Coalinga,* 190 Cal. App. 3d at 1633-35, 236 Cal. Rptr. at 127-29.

Thus, the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process.[5] Indeed, the Supreme Court in *Williamson County* expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of post-deprivation remedies. *See* 473 U.S. at 195-96 n.14. It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. Accordingly, we reject the contention that *Williamson County* requires plaintiffs to seek relief in state court for the alleged violation of their right to due process.

Norco Construction, Inc. v. *King County,* 801 F.2d 1143 (9th Cir. 1986), and its progeny are not to the contrary. We held in *Norco* that a plaintiff's failure to obtain "a final determination on the status of the property" rendered his equal protection and due process claims unripe under *Williamson County. Id.* at 1145; *see also Shelter Creek Dev. Corp.* v. *City of Oxnard,* 838 F.2d 375, 379 (9th Cir. 1988); *Kinzli,* 818 F.2d at 1455-56. The holdings in these cases are limited to *Williamson County's* first exhaustion requirement, which applies to all challenges to regulatory takings, whether based on the just compensation clause,

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[5]We note that the Supreme Court was faced only with a taking claim in *Williamson County;* plaintiffs did not appeal the denial of their substantive and procedural due process and equal protection claims. 473 U.S. at 182 n.4. Although plaintiffs did argue that the due process clause forbids the exercise of police power that amounts to a taking, the Court held the claim unripe under the first *Williamson County* ripeness prong. The Court therefore did not need to reach the second *Williamson County* requirement that just compensation must first be sought through state procedures. 473 U.S. at 199-200.

the due process clause, the equal protection clause or the fourth amendment: Regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant governmental body. Once a final determination has been made, however, the mere fact that a taking is alleged does not create a further exhaustion requirement for non-taking claims.

Nor does *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987), teach otherwise. Although we stated in *Cassettari* that "[t]he Constitution . . . does not require a state to provide pre-taking notice [or] an opportunity to be heard," *id.* at 738, it is clear that we were speaking of the just compensation clause, not the due process clause. Indeed, our only support for this proposition was the Supreme Court's statement that "'[t]he *Just Compensation Clause* has never been held to require pre-taking process.'" *Id.* at 738-39 (quoting *Williamson County,* 473 U.S. at 196 n.14) (emphasis added). *Cassettari* certainly does not purport to hold, in contravention to long-established principles of due process, that the government need never provide process before depriving individuals of their property interests.

B. We turn to the merits of plaintiff's due process claim. At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' *prior* to the deprivation of a significant property interest." *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 19 (1978) (emphasis added); *see Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299 (1981); *Fuentes* v. *Shevin,* 407 U.S. 67, 81-82 (1972); *Boddie* v. *Connecticut,* 401 U.S. 371,

378-79 (1971); *Tom Growney Equipment, Inc.* v. *Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 835 (9th Cir. 1987). Only in extraordinary circumstances involving " 'the necessity of quick action by the State or the impracticality of providing any [meaningful] predeprivation process' " may the government dispense with the requirement of a hearing prior to the deprivation. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (quoting *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981)).

Defendants contend that *Parratt* v. *Taylor* forecloses the plaintiffs' due process claim. *Parratt* held that the deprivation of property "as a result of a random and unauthorized act by a state employee," 451 U.S. at 541, does not violate due process, so long as there is no showing that post-deprivation procedures for obtaining compensation are inadequate or "that it was praticable for the State to provide a predeprivation hearing." *Id.* at 543. Plaintiffs, however, do not allege that the injury to their dam was the result of the "random and unauthorized act of a state employee." All parties agree that the decision was made by senior DSOD officials under color of the authority vested in DSOD by California Water Code §§ 6100, 6102, 6110-12 (West 1971).[6] As we stated in *Piatt* v. *MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc):

> Where the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out

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[6]Pursuant to these statutes, the DSOD supervises "the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof," Cal. Water Code § 6100, and "may in emergency . . . [t]ake such . . . steps as may be essential to safeguard life and property." *Id.* § 6111.

> state policy act under the apparent authority of those directives, it makes no sense to say either that their conduct is "random" or that it is impossible for the state to provide a hearing in advance of the deprivation. The considerations underlying *Parratt* are simply inapplicable . . . .

Plaintiffs' claims are not barred by *Parratt*.

The principle announced in *Parratt* is not, however, the only exception to the general requirement of notice and an opportunity to be heard prior to the deprivation of property. The Supreme Court has repeatedly held that summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *See, e.g., Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299-300 (1981); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 677-80 (1974); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 599-600 (1950); *Yakus* v. *United States,* 321 U.S. 414, 442-43 (1944); *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306, 315-21 (1908). Breaching a dam so as to avoid the risk of disastrous flooding falls neatly into this "emergency action" category.

Plaintiffs contend that defendants are not entitled to rely on the emergency action defense because there was *in fact* no emergency, as should have been apparent from the fact that the lake was virtually empty when the dam was breached. Although there was no emergency at the time the dam was breached, states are given "great leeway in adopting summary procedures to protect public health and safety," even in the absence of an emergency in the usual sense. *Mackey* v. *Montrym,* 443 U.S. 1, 17 (1979) (summary suspension of drivers refusing to take breath-analysis test). Because government officials need to act

promptly and decisively when they perceive an emergency, no predeprivation process is due. *See Virginia Surface Mining,* 452 U.S. at 302-03; *North American,* 211 U.S. at 319-20.

Notwithstanding the deference accorded to officials exercising summary powers to protect the public, their power to declare an emergency and thus eliminate the constraints of the due process clause is not without bounds. *See, e.g., Virginia Surface Mining,* 452 U.S. at 302 n.46 (due process violations might arise if "a pattern of abuse and arbitrary action were discernible from review of an agency's administration of a summary procedure"). The rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-83 (1964) (need to avoid chilling effect on protected expression is satisfied by imposition of "actual malice" standard in libel cases involving public figures).

[5] As already noted, plaintiffs alleged that by March 8 the emergency was over. Yet, at the direction of the DSOD, workers began lowering the spillway on March 10; and on March 11 the dam was breached and the lake destroyed. Accepting plaintiffs' allegations as true — as we must on this review from the grant of a motion on the pleadings — there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process.

III

Plaintiffs next assert that, in breaching the dam, defendants violated their rights to substantive due process. We have recognized that the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. *See Smith* v. *City of Fontana,* 818 F.2d 1411 (9th Cir.), *cert. denied,* 108 S. Ct. 311 (1987). Defendants argue that plaintiffs' substantive due process claim is barred by *Williamson County* and *Parratt.* Neither case is on point.[7] We have previously held that "substantive due process is violated at the moment the harm occurs [and therefore] the existence of a postdeprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." *Rutherford* v. *City of Berkeley,* 780 F.2d 1444, 1447 (9th Cir. 1986). Thus, *Parratt* is inapplicable to such claims, *see Smith* v. *City of Fontana,* 818 F.2d at 1414-15, as is the second ripeness prong of *Williamson County* (requiring exhaustion of state procedures for obtaining compensation). Moreover, the first ripeness prong of *Williamson County* (requirement of final decision), while applicable to most substantive due process claims arising out of alleged regulatory takings, *see Shelter Creek,* 838 F.2d at 379; *Kinzli,* 818 F.2d at 1456; *Norco Construction,* 801 F.2d at 1145, is not relevant to a physical taking claim

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[7]Nor is the emergency action exception to the normal requirement of predeprivation process, *see* pp. 75-77 *supra,* relevant in this context. *Virginia Surface Mining, North American* et al., considered whether some form of hearing is required before the government acts in emergency situations. This inquiry is unrelated to the separate question of whether the government's action violated substantive constitutional constraints, even though the government's decision was reached in a procedurally correct manner.

because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation.

Defendants argue that special ripeness requirements nonetheless apply when substantive due process claims arise out of fact situations that also give rise to taking claims. They rely on *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo,* 841 F.2d 872 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 79 (1988), and *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987).

We do not agree. In *Lake Nacimiento* we held that *Parratt* barred what plaintiffs styled a substantive due process claim but was in fact a procedural due process claim involving "an attack on the decision-making process itself." 841 F.2d at 879. Plaintiffs here are challenging the defendants' decision, not merely the process by which it was reached. *Lake Nacimiento* is not controlling.

Cassettari is even less on point. That case limits its discussion of ripeness to fifth amendment taking claims. Indeed, in explaining why Cassettari's taking claim was unripe, we distinguished cases involving claims based on substantive due process and the fourth amendment. We observed that in those cases, in contrast to taking cases, "the deprivation of a federal right occurs regardless of the availability of a state remedy." 824 F.2d at 739. Neither *Cassettari* nor *Lake Nacimiento* speaks to a true substantive due process claim.

[6] Because we conclude that plaintiffs' substantive due process claim is ripe, we must next consider whether plaintiffs have stated a claim for relief. *See Alcaraz* v. *Block,* 746 F.2d 593, 602 (9th Cir. 1984) (court of appeals must affirm district court's grant of summary judgment if correct, even if reached for wrong reason). To establish a

violation of substantive due process, the plaintiffs must prove that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see Moore* v. *City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977) (plurality opinion); *id.* at 514 (Stevens, J., concurring in the judgment); *Nectow* v. *City of Cambridge*, 277 U.S. 183, 187-88 (1928).

Plaintiffs allege that the decision to breach the dam was originally made on March 4, 1983, and reaffirmed on March 10. Not only were these decisions kept secret without any legitimate reason, DSOD officials deceived plaintiffs with assurances that the dam would *not* be breached. Indeed, DSOD allegedly returned control of the lake to the plaintiffs at one point, promising to maintain the water level. In addition, plaintiffs allege that defendants well knew that the emergency was over by March 8, three days before defendants actually breached the dam. Plaintiffs thus claim that defendants breached the dam when they knew, or should well have been aware, that such an action was unjustified, and that they shrouded their decision in a veil of secrecy and deception wholly unjustified by the situation.

A government entity's police and eminent domain powers go far beyond crisis management; the city certainly has the power to protect its citizens by breaching a dam it considers potentially, though perhaps not imminently, dangerous. But government power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm. *See Silverman* v. *Barry*, 845 F.2d 1072, 1080 (D.C. Cir.) ("[t]o succeed in a § 1983 suit for damages for a substantive due process . . . violation, a plaintiff must at least show that state officials

are guilty of grave unfairness in the discharge of their legal responsibilities"), *cert. denied,* 57 U.S.L.W. 3346 (U.S. Nov. 14, 1988) (No. 88-615); *Bello* v. *Walker,* 840 F.2d 1124, 1129 (3rd Cir.) ("deliberate and arbitrary abuse of government power violates an individual's right to substantive due process"), *cert. denied* 109 S. Ct. 134 (1988).

Our cases recognize that the due process clause places a substantive, as well as a procedural, limitation on the exercise of governmental power. In *Vaughan* v. *Ricketts,* No. 87-2526, slip op. 12943 (9th Cir. Oct. 14, 1988), for example, we considered the immunity from suit of a prison warden for digital rectal searches conducted by prison guards. The question of immunity, in turn, hinged on the warden's knowledge that the searches violated the Constitution. Digital rectal searches are clearly justified under certain circumstances. *See, e.g., United States* v. *Velasquez,* 469 F.2d 264 (9th Cir. 1972), *cert. denied,* 410 U.S. 945 (1973); *Rivas* v. *United States,* 368 F.2d 703 (9th Cir. 1966), *cert. denied,* 386 U.S. 945 (1967). In *Vaughan,* however, the prisoners claimed that the searches were conducted " 'maliciously and sadistically . . . for the purpose of causing harm,' " and accompanied by "joking and insults directed at the inmates . . . ." Slip op. at 12954. We concluded that the warden should well have known that the searches conducted in that fashion violated the prisoners' substantive due process rights.

We reached a similar conclusion in *Rutherford* v. *City of Berkeley,* 780 F.2d 1444, 1446 (9th Cir. 1986), and *Meredith* v. *Arizona,* 523 F.2d 481, 484 (9th Cir. 1975). In these cases, defendant police officers and prison guards were accused of unjustified brutality against suspects and prisoners. Government officials are, of course, justified in using force — even deadly force — in carrying out legiti-

mate governmental functions. But, when the force is excessive, or used without justification or for malicious reasons, there is a violation of substantive due process. In determining whether due process has been violated under these circumstances, we have adopted the Second Circuit's standard in *Johnson* v. *Glick,* 481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973):

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort . . . or maliciously . . . for the very purpose of causing harm.

Id. at 1033.

Police and prison guard brutality are among the most egregious abuses of governmental power. But the fourteenth amendment's due process clause protects property no less than life and liberty. U.S. Const. amend. XIV, § 1 ("[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"). To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints.[8]

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[8]As noted by Professor Norman Karlin, the freedoms granted by the bill of rights were cut from a single constitutional cloth:

> Rights were owned by the people, as individuals, and never dichotomized into personal and property. It was to the contrary. The principle established by the Magna Carta and thus basic to the common law and later to the Constitution was the identification of liberty and property. Ownership of property was evidence of liberty. In solemn ceremony, it was there decreed that neither the

Justice Harlan expressed this view eloquently in *Poe* v. *Ullman*, 367 U.S. 497 (1961):

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .

Id. at 543, (Harlan, J., dissenting), *quoted with approval in Moore* v. *City of East Cleveland*, 431 U.S. at 502 (plurality opinion). As Justice Brennan aptly noted, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).[9] Generalizing the *Johnson* v. *Glick* standard, therefore,

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> King nor government could take property except *per legem terrae*. The reach was not procedural but substantive. Coke in his writings used the phrase interchangeably with "due process of law;" and, in this form, the concept was included in the fifth amendment of the United States Constitution. Life, liberty and property comprised an invulnerable trilogy. . . .

Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 Sw. U.L. Rev. 627, 637-38 (footnotes omitted). *See also* Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, in Economic Liberties and the Judiciary 183, 200 (J. Dorn & H. Manne eds. 1987).

[9]Although Justice Brennan (speaking for four Justices) dissented on procedural grounds, his substantive views apparently enjoyed the support of a majority of the Court. *See San Diego Gas*, 450 U.S. at 633-34 (Rehnquist, J., concurring) ("If I were satisfied [that the

> [i]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the [governmental action], the relationship between the need and the [action taken], the extent of [damage] inflicted, and whether [the action was taken] in a good faith effort . . . or maliciously . . . for the very purpose of causing harm.

Johnson, 481 F.2d at 1033. To be sure, governmental entities must have latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power. *See Moore,* 431 U.S. at 520.21 (Stevens, J., concurring) (ordinance not shown to have substantial relation to public health, safety or morals, which cuts deeply into fundamental rights normally associated with ownership of residential property, violates substantive due process).

The exercise of emergency powers is particularly subject to abuse. Emergency decision-making is, by its nature, abbreviated; it normally does not admit participation by, or input from, those affected; judicial review, as this case illustrates, is often greatly curtailed or non-existent. Exigent circumstances often prompt actions that severely undermine the rights of citizens, actions that might be eschewed after more careful reflection or with the benefit of safeguards that normally constrain governmental action. *See generally* Karlin, 17 Sw. U.L. Rev. at 653-57. Whether government officials invoked emergency powers when they knew, or well should have known, that no exigency justified use of such draconian

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jurisdictional requirements had been met], I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.").

measures, is therefore highly relevant in applying the *Johnson* v. *Glick* standard in this context.

[7] We conclude that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes.[10] While defendants dispute these charges, that dispute cannot be resolved on a motion for judgment on the pleadings.

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[10]Although plaintiffs' allegations that the defendants failed to conduct statutorily required engineering studies or to inform them of their decision to breach the dam form the basis of their procedural due process claim, these allegations are also relevant to their substantive due process claim; indeed, it is almost inevitable that there will be some overlap between the allegations supporting both claims. As Judge Posner recently noted:

> the line between "procedure" and "substance" is hazy in the setting of the regulation of land uses. The denial of the plaintiffs' site plan without a full statement of reasons is what gives the denial such arbitrary cast as it may have, and thus lends color to the claim of irrationality, which is the substantive due process claim; but the failure to give reasons is also the cornerstone of the procedural due process claim. It is no good saying that if a person is deprived of property for a bad reason it violates substantive due process and if for no reason it violates procedural due process. Unless the bad reason is invidious or irrational, the deprivation is constitutional; and the no-reason case will sometimes be a case of invidious or irrational deprivation, too, depending on the motives and consequences of the challenged action.

Coniston Corp. v. *Village of Hoffman Estates,* 844 F.2d 461, 468 (7th Cir. 1988).

IV

Finally, plaintiffs allege that they were deprived of their right "to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures," in violation of the fourth amendment. U.S. Const. amend. IV. Defendants once again respond that plaintiffs' claim is not ripe.[11] They point to *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987), where we rejected a taking claim purportedly based on the fourth amendment.

[8] We agree that plaintiffs' claim is precluded by *Cassettari,* where we stated:

> Cassettari also argues that when the County took his property without paying him for it, the County violated his fourth amendment right to be secure against unreasonable seizures. This argument is without merit. A claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments.

Id. at 740 n.7. The claim plaintiffs alleged under the fourth amendment is, in fact, a taking claim which is properly asserted under the fifth amendment. The claim is unripe under *Williamson County,* 473 U.S. at 200.

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[11]They also claim that *Parratt* and the emergency seizure cases, discussed pp. 75-77 *supra,* foreclose this claim. As we indicated above, however, *Parratt* is limited to procedural due process claims; it has no relevance in the context of a fourth amendment claim. *See Robins* v. *Harum,* 773 F.2d 1004, 1009 (9th Cir. 1985); *accord Wolf-Lillie* v. *Sonquist,* 699 F.2d 864, 870-72 (7th Cir. 1983). Similarly, the emergency seizure cases apply only to procedural due process claims. *See* note 7 *supra.*

Conclusion

The district court's judgment as to the taking and fourth amendment claims are affirmed; the judgment as to the procedural and substantive due process claims are reversed. We remand for further proceedings consistent with this opinion.

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APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINALOA LAKE OWNERS ASSOCIATION, et al.,
Plaintiffs/Appellants,

v.

CITY OF SIMI VALLEY,
Defendant/Appellee,
JAMES DOODY, et al.,
Defendants-cross-defendants/Appellees.

v.

DONALD G. TUDOR; JENNIE P. TUDOR, et al.,
Third-party-defendants/Appellees,
COUNTY OF VENTURA,
Defendant-third-party-plaintiff/cross-claimant.

No. 86-6425

D.C. No. CV-83-8220-ER

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
April 5, 1988 — Pasadena, California

Filed January 6, 1989
Amended March 23, 1989

Before: Melvin Brunetti, Alex Kozinski and
David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Constitutional Law

Appeal from judgment on the pleadings finding the case not ripe for decision in a 42 U.S.C. § 1983 suit alleging deprivation of fourth, fifth, and fourteenth amendment rights. Affirming the taking and fourth amendment claims, the court reversed and remanded the procedural and substantive due process claims holding that the government violated plaintiff's due process rights by failing to provide an opportunity for a hearing and by shrouding its decision in secrecy and deception precluded plaintiffs from taking advantage of available legal processes.

This case arises out of the Division Chief of the California Division of Safety of Dams (DSOD) defendant James Doody's decision to breach plaintiffs', Sinaloa Lake Owners Association, apparently unsafe dam. The dam was breached after plaintiffs were unsuccessful in obtaining a temporary restraining order. Plaintiffs filed suit under 42 U.S.C. § 1983 alleging deprivation of their fourth, fifth and fourteenth amendment rights. Defendants successfully moved for judgment on the pleadings, claiming that the case was not ripe for decision.

[1] In light of *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of. [2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial. They offer nothing, however, to substantiate this claim. [3] Nor is the court swayed by the alleged "reluctance of the California State Court system to lend a sympathetic ear to private property owners in

just compensation cases." [4] This court rejected defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. [5] Accepting plaintiffs' allegations as true, there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process. [6] After concluding that plaintiffs' substantive due process claim was ripe, [7] the court concluded that plaintiffs stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes. While defendants dispute these charges, this dispute cannot be resolved on a motion for judgment on the pleadings. [8] Finally, plaintiffs' taking claim under the fourth amendment is precluded by *Cassettari v. County of Nevada,* 824 F.2d 735, where this court stated that a claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments. The claim is unripe under *Williamson County.*

COUNSEL

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Henry J. Walsh and Carol A. Woo, Lawler, Bonham & Walsh, Ventura, California, for the defendant-appellee City of Simi Valley.

Joel A. Davis, Deputy Attorney General, Los Angeles, California, for the defendants-appellees Doody, Persson, Jacinto, Ley, Stephenson and McEwan.

ORDER

The opinion, published at 864 F.2d 1475 (9th Cir. 1989), is amended as follows:

On page 1478, paragraph 1, insert after the last sentence: "By then, the lake had been lowered by 25 feet from its high water level and was at less that 10 percent capacity."

On page 1478, paragraph 2, replace the last sentence with: "Immediately after the hearing, DSOD's contractors breached the dam."

OPINION

KOZINSKI, Circuit Judge:

We consider whether plaintiffs' fourth, fifth and fourteenth amendment claims are ripe for adjudication in federal court despite failure to exhaust state judicial remedies.

Facts

The complaint and stipulations of the parties set forth the following scenario:[1] Plaintiff Sinaloa Lake Owners

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[1]We treat the parties' stipulations as pro tanto amendments of the pleadings.

Association owns Sinaloa Dam and Sinaloa Lake, the lake behind the dam. The individual plaintiffs own property surrounding the lake. The lake and the dam are located within the County of Ventura, outside the City of Simi Valley.

The California Division of Safety of Dams (DSOD), a division of the California Department of Water Resources, is responsible for inspecting non-federally owned dams in California. On February 11, 1983, after conducting an inspection of Sinaloa Dam, DSOD sent a letter to James Stutzman, former president of the Association, directing the Association to take certain corrective actions and report back to DSOD no later than March 15, 1983.

Between February 25 and March 3, heavy rains raised the water level of Sinaloa Lake. On March 2, there were two slides on the face of the dam. Plaintiffs allege that these slides were caused by (1) a leak in a city-owned high-pressure water pipe running through the dam; (2) the county's actions in raising the dam's spillway, which allowed more water to accumulate behind the dam; and (3) the heavy rains. City officials immediately evacuated residents living below the dam and began pumping water out of the lake.

On March 3, defendant David Jacinto, a DSOD Associate Field Engineer, arrived at the dam and assumed control of the situation. He took additional steps to reduce the water level behind the dam. The Army Corps of Engineers inspected the dam and concluded it was stable.

On March 4, without advising plaintiffs, DSOD officials decided to breach the dam in order to drain the lake; this decision was not implemented immediately. By the next day, the water level was 10 to 12 feet below the high water

mark. The city decided that the emergency was over, and advised evacuated residents to return to their homes.

On March 6, defendant James Doody, Division Chief of DSOD, countermanded the decision to breach the dam, and instead ordered workers to proceed with plans to lower the spillway. By March 8 the emergency was over: The water level was down 22 feet and DSOD promised to maintain that level to enable the Association to maintain fish in the lake.

On March 10, at the direction of DSOD, workers began lowering the spillway in order to reduce the risk of future problems. By that time, however, defendant Doody and other senior officials of DSOD had once again decided to breach the dam. The plaintiffs were not advised of the latest decision until a few hours before DSOD contractors were scheduled to begin breaching the dam at 4:00 p.m. on Friday, March 11. By then, the lake had been lowered by 25 feet from its high water level and was at less than 10 percent capacity.

In an attempt to obtain a temporary restraining order, plaintiffs secured an informal hearing before a Superior Court Judge that afternoon. The judge refused to act, however, because plaintiffs were unable to produce a completed engineering study or testimony from an engineer showing that the dam was safe. DSOD produced no evidence indicating that the dam was unsafe. No order was entered and no record was made of the in-camera proceedings; apparently the matter was not even assigned a case number. Immediately after the hearing, DSOD's contractors breached the dam.

Plaintiffs filed suit under 42 U.S.C. § 1983 on December 16, 1983, alleging deprivation of their fourth, fifth and fourteenth amendment rights. Their second amended

complaint was filed on July 2, 1984. On May 15, 1986, a month before the case was scheduled to go to trial, defendants moved for judgment on the pleadings, claiming that the case was not ripe for decision. The district court granted the motion as to all defendants. After their motion to amend the judgment was denied, plaintiffs timely appealed.

Discussion

We review the district court's grant of judgment on the pleadings de novo, taking all material allegations of the nonmoving party as true and construing them in the light most favorable to that party. Judgment on the pleadings will not be granted unless "the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 604 (1969). Motions for judgment on the pleadings, like motions to dismiss for failure to state a claim, must be viewed with particular skepticism in cases involving claims of inverse condemnation. *See Hall* v. *City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 1120 (1988).

I

Plaintiffs claim that defendants' actions in breaching the dam and destroying the lake amounted to a taking of their property without just compensation, in violation of the fifth amendment. Defendants argue, and the district court held, that this claim is not ripe because plaintiffs have failed to exhaust their state remedies.

Defendants rely on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985), which places two hurdles in the way of a taking claim

brought in federal court against states and their political subdivisions. First, *Williamson County* affirms the principle that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. As we held in *Hall,* however, *Williamson County's* final decision requirement is inapplicable in cases of physical invasion. 833 F.2d at 1282 n.28. A physical taking, such as the one at issue here, is by definition a final decision, and thereby satisfies *Williamson County's* first exhaustion requirement.

The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194-95. The Court reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation. *Id.*

Plaintiffs, citing footnote 28 of *Hall,* contend that the second requirement of *Williamson County* is also inapplicable to physical invasion cases. That footnote, however, only relieves plaintiffs of the obligation to exhaust administrative remedies in physical taking cases — it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.

Contrary to plaintiffs' assertions, this interpretation of *Hall* does not conflict with *Williamson County. Williamson*

County only requires exhaustion of state judicial remedies when the state provides "an adequate process for obtaining compensation." 473 U.S. at 194. Plaintiffs need not bring a state court action when it would be futile under existing state law. *Williamson County,* 473 U.S. at 196-97; *Kinzli* v. *City of Santa Cruz,* 818 F.2d 1449, 1455 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 775 (1988); *Furey* v. *City of Sacramento,* 780 F.2d 1448, 1450 n.1 (9th Cir. 1986). Although the alleged taking in *Hall* amounted to a physical invasion, it was effected by a city ordinance. At the time the ordinance was passed, no action for inverse condemnation based on a regulatory taking could be brought under California law; the landowner's sole remedy was to seek invalidation of the offending statute. *See Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 274-77, 598 P.2d 25, 29-31, 157 Cal. Rptr. 372, 376-78 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980); *see also Furey,* 780 F.2d at 1450 n.1. Although the Supreme Court later expressly disapproved this aspect of California law, *see First English Evangelical Lutheran Church* v. *County of Los Angeles,* 107 S. Ct. 2378, 2387 (1987), the appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs. *See Williamson,* 473 U.S. at 194 ("all that is required is that a '"reasonable, certain and adequate provision for obtaining compensation"' exist *at the time of the taking*") (emphasis added; citations omitted).

[1] Unlike *Hall,* the taking here was effected by direct governmental action, not by an ordinance. California law has long provided a damages remedy for this type of taking claim. *See Holtz* v. *San Francisco Bay Area Rapid Transit Dist.,* 17 Cal. 3d 648, 652, 552 P.2d 430, 433, 131 Cal. Rptr. 646, 649 (1976); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d 1627, 1633-35, 236 Cal. Rptr. 124, 127-29

(1987). Thus, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of.

[2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial, and because of what they suggest is the California courts' longstanding hostility toward taking claims. They offer nothing to substantiate their claim that they will suffer unreasonable delay in state court, other than the bare assertion that their case would not go to trial for four years or more. Such a generalized assertion falls far short of the evidence needed to show the futility of resorting to state courts for relief. Indeed, the published available data seems to paint a different picture. According to information provided by the Ventura County Superior Court to the Judicial Council of California, the median time between the filing of a complaint and trial in civil non-jury cases in 1987 was less than three years. *See* Letter from Jay S. Widdows, Administrative Assistant, Ventura County Superior Court, to Alex Kozinski, Circuit Judge (July 22, 1988) (attaching data on median length of time for complaint-to-trial and at-issue memorandum-to-trial in Ventura County Superior Court).[2] Moreover, the time from filing to trial is not a particularly helpful measure of delay in a state like California, which allows a plaintiff up to three years from date of filing to effect service. Cal. Civ. Proc. Code § 583.210 (West Supp. 1988). A more meaningful measure of delay is the time between the filing of the at-issue memorandum and trial, since filing of the at-issue memorandum places the matter on the civil active list. Cal. Super. Ct. R. 209 (West Supp. 1988). That period was less than 8 months for civil nonjury trials and less than 10 months for civil jury trials

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[2]We take judicial notice of these figures, contained in the reports of a public body, pursuant to Fed. R. Evid. 201(b)(2).

in Ventura County in 1987. We cannot say that this delay is so excessive as to render resort to the state court system futile.

[3] Nor are we swayed by the alleged "reluctance of the California State Court system to lend a sympathetic ear to private property owners in just compensation cases." Appellants' Opening Brief at 29. California courts have held on similar facts that property owners are entitled to present their claims for just compensation to a jury. *See, e.g., Archer* v. *City of Los Angeles,* 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941) ("[i]n certain circumstances . . . the taking or damaging of private property [to safeguard public health, safety or morals] is not prompted by so great a necessity as to be justified without proper compensation to the owner"); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d at 1635-36, 236 Cal. Rptr. at 128-29 (dispute over existence of emergency warranting destruction of property and over grant of consent by owners to that act required dismissal of summary judgment); *Leppo* v. *City of Petaluma,* 20 Cal. App. 3d 711, 719 97 Cal. Rptr. 840, 844 (1971) (damages appropriate where city failed to establish evidence of emergency justifying destruction of building). Plaintiffs do not explain why they fear that right will be denied them. We conclude that California provides plaintiffs an adequate procedure for obtaining just compensation.

Finally, plaintiffs assert that defendants are barred by laches from raising *Williamson County* as defense.[3] De-

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[3]Plaintiffs filed this lawsuit in December 1983, yet it was not until May 1986, one month before trial was to begin, that defendants first raised a ripeness challenge. It is clear they knew from the beginning that plaintiffs had not exhausted their state compensation remedies. Moreover, even before *Williamson County* was decided in June 1985, defendants were on notice that claims under the just compensation

fendants respond that laches cannot bar their *Williamson County* defense because the failure to seek compensation in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction. *See Austin* v. *City and County of Honolulu*, 840 F.2d 678, 682 (9th Cir. 1988). We agree with defendants that ripeness is a jurisdictional requirement and lack of subject matter jurisdiction may not be waived.[4]

II

The due process clause protects individuals against governmental deprivations of property without due process of law. U.S. Const. amend. XIV, § 1. Plaintiffs contend that the DSOD's actions in breaching the dam and destroying the lake without providing plaintiffs adequate notice or a hearing amounted to a violation of due process.

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clause were not ripe until available state compensation remedies had been exhausted. *See Williamson County*, 473 U.S. at 194-95 (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)).

The district court also expressed concern about this delay:

> [N]one of the defendants had ever moved to question the propriety of the case being here [in federal court] until here we are about one week before trial. I consider that to be dilatory and not in the best interest of the clients, necessarily. This request should have been raised at the outset in this case.

Reporter's Transcript, June 16, 1986, at 1-2.

[4]Although plaintiffs' taking claim is not ripe for our review, it would be entirely appropriate on remand for the district court, in the interest of judicial economy and particularly in view of defendants' undue delay in raising *Williamson County, see* n.3 *supra*, to permit plaintiffs to amend their complaint to include a pendent state law taking claim. *See, e.g., Rose* v. *City of Coalinga*, 190 Cal. App. 3d at 1633-35, 236 Cal. Rptr. at 127-29.

[4] A. As a threshold matter, we reject defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. This requirement, derived from "the special nature of the Just Compensation Clause," 473 U.S. at 196 n. 14, states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking; it has no application to other types of constitutional claims, even where those claims arise out of facts that also give rise to a taking claim.

Thus, the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process.[5] Indeed, the Supreme Court in *Williamson County* expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of postdeprivation remedies. *See* 473 U.S. at 195-96 n. 14. It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. Accordingly, we reject the contention that *Williamson County* requires plaintiffs to

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[5]We note that the Supreme Court was faced only with a taking claim in *Williamson County;* plaintiffs did not appeal the denial of their substantive and procedural due process and equal protection claims. 473 U.S. at 182 n.4. Although plaintiffs did argue that the due process clause forbids the exercise of police power that amounts to a taking, the Court held the claim unripe under the first *Williamson County* ripeness prong. The Court therefore did not need to reach the second *Williamson County* requirement that just compensation must first be sought through state procedures. 473 U.S. at 199-200.

seek relief in state court for the alleged violation of their right to due process.

Norco Construction, Inc. v. *King County,* 801 F.2d 1143 (9th Cir. 1986), and its progeny are not to the contrary. We held in *Norco* that a plaintiff's failure to obtain "a final determination on the status of the property" rendered his equal protection and due process claims unripe under *Williamson County. Id.* at 1145; *see also Shelter Creek Dev. Corp.* v. *City of Oxnard,* 838 F.2d 375, 379 (9th Cir. 1988); *Kinzli,* 818 F.2d at 1455-56. The holdings in these cases are limited to *Williamson County's* first exhaustion requirement, which applies to all challenges to regulatory takings, whether based on the just compensation clause, the due process clause, the equal protection clause or the fourth amendment: Regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant governmental body. Once a final determination has been made, however, the mere fact that a taking is alleged does not create a further exhaustion requirement for nontaking claims.

Nor does *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987), teach otherwise. Although we stated in *Cassettari* that "[t]he Constitution . . . does not require a state to provide pre-taking notice [or] an opportunity to be heard," *id.* at 738, it is clear that we were speaking of the just compensation clause, not the due process clause. Indeed, our only support for this proposition was the Supreme Court's statement that " '[t]he *Just Compensation Clause* has never been held to require pre-taking process.' " *Id.* at 738-39 (quoting *Williamson County,* 473 U.S. at 196 n.14) (emphasis added). *Cassettari* certainly does not purport to hold, in contravention to long-established principles of due process, that the government

need never provide process before depriving individuals of their property interests.

B. We turn to the merits of plaintiffs' due process claim. At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' *prior* to the deprivation of a significant property interest." *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 19 (1978) (emphasis added); *see Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299 (1981); *Fuentes* v. *Shevin,* 407 U.S. 67, 81-82 (1972); *Boddie* v. *Connecticut,* 401 U.S. 371, 378-79 (1971); *Tom Growney Equipment, Inc.* v. *Shelley Irrigation Dev., Inc.,* 834 F.2d 833, 835 (9th Cir. 1987). Only in extraordinary circumstances involving " 'the necessity of quick action by the State or the impracticality of providing any [meaningful] predeprivation process' " may the government dispense with the requirement of a hearing prior to the deprivation. *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) (quoting *Parratt* v. *Taylor,* 451 U.S. 527, 539 (1981)).

Defendants contend that *Parratt* v. *Taylor* forecloses the plaintiffs' due process claim. *Parratt* held that the deprivation of property "as a result of a random and unauthorized act by a state employee," 451 U.S. at 541, does not violate due process, so long as there is no showing that post-deprivation procedures for obtaining compensation are inadequate or "that it was practicable for the State to provide a predeprivation hearing." *Id.* at 543. Plaintiffs, however, do not allege that the injury to their dam was the result of the "random and unauthorized act of a state employee." All parties agree that the decision was made by senior DSOD officials under color

of the authority vested in DSOD by California Water Code §§ 6100, 6102, 6110-12 (West 1971).[6] As we stated in *Piatt* v. *MacDougall,* 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc):

> Where the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives, it makes no sense to say either that their conduct is "random" or that it is impossible for the state to provide a hearing in advance of the deprivation. The considerations underlying *Parratt* are simply inapplicable . . . .

Plaintiffs' claims are not barred by *Parratt.*

The principle announced in *Parratt* is not, however, the only exception to the general requirement of notice and an opportunity to be heard prior to the deprivation of property. The Supreme Court has repeatedly held that summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *See, e.g., Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299-300 (1981); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 677-80 (1974); *Ewing* v. *Mytinger & Casselberry, Inc.* 339 U.S. 594, 599-600 (1950); *Yakus* v. *United States,* 321 U.S. 414, 442-43 (1944); *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306, 315-

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[6]Pursuant to these statutes, the DSOD supervises "the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof," Cal. Water Code § 6100, and "may in emergency . . . [t]ake such . . . steps as may be essential to safeguard life and property." *Id.* § 6111.

21 (1908). Breaching a dam so as to avoid the risk of disastrous flooding falls neatly into this "emergency action" category.

Plaintiffs contend that defendants are not entitled to rely on the emergency action defense because there was *in fact* no emergency, as should have been apparent from the fact that the lake was virtually empty when the dam was breached. Although there was no emergency at the time the dam was breached, states are given "great leeway in adopting summary procedures to protect public health and safety," even in the absence of an emergency in the usual sense. *Mackey* v. *Montrym,* 443 U.S. 1, 17 (1979) (summary suspension of drivers refusing to take breath-analysis test). Because government officials need to act promptly and decisively when they perceive an emergency, no predeprivation process is due. *See Virginia Surface Mining,* 452 U.S. at 302-03; *North American,* 211 U.S. at 319-20.

Notwithstanding the deference accorded to officials exercising summary powers to protect the public, their power to declare an emergency and thus eliminate the constraints of the due process clause is not without bounds. *See, e.g., Virginia Surface Mining,* 452 U.S. at 302 n.46 (due process violations might arise if "a pattern of abuse and arbitrary action were discernible from review of an agency's administration of a summary procedure"). The rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-83 (1964) (need to avoid chilling effect on protected expression is satisfied by imposition of "actual malice" standard in libel cases involving public figures).

[5] As already noted, plaintiffs alleged that by March 8 the emergency was over. Yet, at the direction of the DSOD, workers began lowering the spillway on March 10; and on March 11 the dam was breached and the lake destroyed. Accepting plaintiffs' allegations as true — as we must on this review from the grant of a motion on the pleadings — there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process.

III

Plaintiffs next assert that, in breaching the dam, defendants violated their rights to substantive due process. We have recognized that the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. *See Smith* v. *City of Fontana,* 818 F.2d 1411 (9th Cir.), *cert. denied,* 108 S. Ct. 311 (1987). Defendants argue that plaintiffs' substantive due process claim is barred by *Williamson County* and *Parratt.* Neither case is on point.[7] We have previously held that "substantive due process is violated at the moment the harm occurs [and therefore] the existence of

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[7]Nor is the emergency action exception to the normal requirement of predeprivation process, *see* pp. 75-77 *supra,* relevant in this context. *Virginia Surface Mining, North American* et al., considered whether some form of hearing is required before the government acts in emergency situations. This inquiry is unrelated to the separate question of whether the government's action violated substantive constitutional constraints, even though the government's decision was reached in a procedurally correct manner.

a postdeprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." *Rutherford* v. *City of Berkeley,* 780 F.2d 1444, 1447 (9th Cir. 1986). Thus, *Parratt* is inapplicable to such claims, *see Smith* v. *City of Fontana,* 818 F.2d at 1414-15, as is the second ripeness prong of *Williamson County* (requiring exhaustion of state procedures for obtaining compensation). Moreover, the first ripeness prong of *Williamson County* (requirement of final decision), while applicable to most substantive due process claims arising out of alleged regulatory takings, *see Shelter Creek,* 838 F.2d at 379; *Kinzli,* 818 F.2d at 1456; *Norco Construction,* 801 F.2d at 1145, is not relevant to a physical taking claim because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation.

Defendants argue that special ripeness requirements nonetheless apply when substantive due process claims arise out of fact situations that also give rise to taking claims. They rely on *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo,* 841 F.2d 872 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 79 (1988), and *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987).

We do not agree. In *Lake Nacimiento* we held that *Parratt* barred what plaintiffs styled a substantive due process claim but was in fact a procedural due process claim involving "an attack on the decision-making process itself." 841 F.2d at 879. Plaintiffs here are challenging the defendants' decision, not merely the process by which it was reached. *Lake Nacimiento* is not controlling.

Cassettari is even less on point. That case limits its discussion of ripeness to fifth amendment taking claims. Indeed, in explaining why Cassettari's taking claim was unripe, we distinguished cases involving claims based on

substantive due process and the fourth amendment. We observed that in those cases, in contrast to taking cases, "the deprivation of a federal right occurs regardless of the availability of a state remedy." 824 F.2d at 739. Neither *Cassettari* nor *Lake Nacimiento* speaks to a true substantive due process claim.

[6] Because we conclude that plaintiffs' substantive due process claim is ripe, we must next consider whether plaintiffs have stated a claim for relief. *See Alcaraz* v. *Block,* 746 F.2d 593, 602 (9th Cir. 1984) (court of appeals must affirm district court's grant of summary judgment if correct, even if reached for wrong reason). To establish a violation of substantive due process, the plaintiffs must prove that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 395 (1926); *see Moore* v. *City of East Cleveland,* 431 U.S. 494, 498 n.6 (1977) (plurality opinion); *id.* at 514 (Stevens, J., concurring in the judgment); *Nectow* v. *City of Cambridge,* 277 U.S. 183, 187-88 (1928).

Plaintiffs allege that the decision to breach the dam was originally made on March 4, 1983, and reaffirmed on March 10. Not only were these decisions kept secret without any legitimate reason, DSOD officials deceived plaintiffs with assurances that the dam would *not* be breached. Indeed, DSOD allegedly returned control of the lake to the plaintiffs at one point, promising to maintain the water level. In addition, plaintiffs allege that defendants well knew that the emergency was over by March 8, three days before defendants actually breached the dam. Plaintiffs thus claim that defendants breached the dam when they knew, or should well have been aware, that such an action was unjustified, and that they

shrouded their decision in a veil of secrecy and deception wholly unjustified by the situation.

A government entity's policy and eminent domain powers go far beyond crisis management; the city certainly has the power to protect its citizens by breaching a dam it considers potentially, though perhaps not imminently, dangerous. But government power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm. *See Silverman* v. *Barry,* 845 F.2d 1072, 1080 (D.C. Cir.) ("[t]o succeed in a § 1983 suit for damages for a substantive due process . . . violation, a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities"), *cert. denied,* 57 U.S.L.W. 3346 (U.S. Nov. 14, 1988) (No. 88-615); *Bello* v. *Walker,* 840 F.2d 1124, 1129 (3rd Cir.) ("deliberate and arbitrary abuse of government power violates an individual's right to substantive due process"), *cert. denied,* 109 S. Ct. 134 (1988).

Our cases recognize that the due process clause places a substantive, as well as a procedural, limitation on the exercise of governmental power. In *Vaughan* v. *Ricketts,* No. 87-2526, slip op. 12943 (9th Cir. Oct. 14, 1988), for example, we considered the immunity from suit of a prison warden for digital rectal searches conducted by prison guards. The question of immunity, in turn, hinged on the warden's knowledge that the searches violated the Constitution. Digital rectal searches are clearly justified under certain circumstances. *See, e.g., United States* v. *Velasquez,* 469 F.2d 264 (9th Cir. 1972), *cert. denied,* 410 U.S. 945 (1973); *Rivas* v. *United States,* 368 F.2d 703 (9th Cir. 1966), *cert. denied,* 386 U.S. 945 (1967). In *Vaughan,* however, the prisoners claimed that the searches were conducted " 'maliciously and sadistically . . . for the pur-

pose of causing harm,' " and accompanied by "joking and insults directed at the inmates . . . ." Slip op. at 12954. We concluded that the warden should well have known that the searches conducted in that fashion violated the prisoners' substantive due process rights.

We reached a similar conclusion in *Rutherford* v. *City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986), and *Meredith* v. *Arizona*, 523 F.2d 481, 484 (9th Cir. 1975). In these cases, defendant police officers and prison guards were accused of unjustified brutality against suspects and prisoners. Government officials are, of course, justified in using force — even deadly force — in carrying out legitimate governmental functions. But, when the force is excessive, or used without justification or for malicious reasons, there is a violation of substantive due process. In determining whether due process has been violated under these circumstances, we have adopted the Second Circuit's standard in *Johnson* v. *Glick,* 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973):

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort . . . or maliciously . . . for the very purpose of causing harm.

Id. at 1033.

Police and prison guard brutality are among the most egregious abuses of governmental power. But the fourteenth amendment's due process clause protects property no less than life and liberty. U.S. Const. amend. XIV, § 1 ("[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"). To the extent

that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints.[8] Justice Harlan expressed this view eloquently in *Poe* v. *Ullman*, 367 U.S. 497 (1961):

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .

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[8] As noted by Professor Norman Karlin, the freedoms granted by the bill of rights were cut from a single constitutional cloth:

> Rights were owned by the people, as individuals, and never dichotomized into personal and property. It was to the contrary. The principle established by the Magna Carta and thus basic to the common law and later to the Constitution was the identification of liberty and property. Ownership of property was evidence of liberty. In solemn ceremony, it was there decreed that neither the King nor government could take property except *per legem terrae*. The reach was not procedural but substantive. Coke in his writings used the phrase interchangeably with "due process of law;" and, in this form, the concept was included in the fifth amendment of the United States Constitution. Life, liberty and property comprised an invulnerable trilogy . . . .

Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 Sw. U.L. Rev. 627, 637-38 (footnotes omitted). *See also* Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty,* in Economic Liberties and the Judiciary 183, 200 (J. Dorn & H. Manne eds. 1987).

Id. at 543, (Harlan, J., dissenting), *quoted with approval in Moore* v. *City of East Cleveland*, 431 U.S. at 502 (plurality opinion). As Justice Brennan aptly noted, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).[9] Generalizing the *Johnson* v. *Glick* standard, therefore,

> [i]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the [governmental action], the relationship between the need and the [action taken], the extent of [damage] inflicted, and whether [the action was taken] in a good faith effort . . . or maliciously . . . for the very purpose of causing harm.

Johnson, 481 F.2d at 1033. To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power. *See Moore*, 431 U.S. at 520-21 (Stevens, J., concurring) (ordinance not shown to have substantial relation to public health, safety or morals, which cuts deeply into fundamental rights normally associated with ownership of residential property, violates substantive due process).

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[9] Although Justice Brennan (speaking for four Justices) dissented on procedural grounds, his substantive views apparently enjoyed the support of a majority of the Court. *See San Diego Gas*, 450 U.S. at 633-34 (Rehnquist, J., concurring) ("If I were satisfied [that the jurisdictional requirements had been met], I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.").

The exercise of emergency powers is particularly subject to abuse. Emergency decision-making is, by its nature, abbreviated; it normally does not admit participation by, or input from those affected; judicial review, as this case illustrates, is often greatly curtailed or non-existent. Exigent circumstances often prompt actions that severely undermine the rights of citizens, actions that might be eschewed after more careful reflection or with the benefit of safeguards that normally constrain governmental action. *See generally* Karlin, 17 Sw. U.L. Rev. at 653-57. Whether government officials invoked emergency powers when they knew, or well should have known, that no exigency justified use of such draconian measures, is therefore highly relevant in applying the *Johnson* v. *Glick* standard in this context.

[7] We conclude that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes.[10] While defendants dispute these charges, that

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[10]Although plaintiffs' allegations that the defendants failed to conduct statutorily required engineering studies or to inform them of their decision to breach the dam form the basis of their procedural due process claim, these allegations are also relevant to their substantive due process claim; indeed, it is almost inevitable that there will be some overlap between the allegations supporting both claims. As Judge Posner recently noted:

> the line between "procedure" and "substance" is hazy in the setting of the regulation of land uses. The denial of the plaintiffs' site plan without a full statement of reasons is what gives the denial such arbitrary cast as it may have, and thus lends color to the claim of irrationality, which is the substantive due process

dispute cannot be resolved on a motion for judgment on the pleadings.

IV

Finally, plaintiffs allege that they were deprived of their right "to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures," in violation of the fourth amendment. U.S. Const. amend. IV. Defendants once again respond that plaintiffs' claim is not ripe.[11] They point to *Cassettari* v. *County of Nevada*, 824 F.2d 735 (9th Cir. 1987), where we rejected a taking claim purportedly based on the fourth amendment.

> claim; but the failure to give reasons is also the cornerstone of the procedural due process claim. It is no good saying that if a person is deprived of property for a bad reason it violates substantive due process and if for no reason it violates procedural due process. Unless the bad reason is invidious or irrational, the deprivation is constitutional; and the no-reason case will sometimes be a case of invidious or irrational deprivation, too, depending on the motives and consequences of the challenged action.

Coniston Corp. v. *Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir.)

[11] They also claim that *Parratt* and the emergency seizure cases, discussed pp. 75-77 *supra*, foreclose this claim. As we indicated above, however, *Parratt* is limited to procedural due process claims; it has no relevance in the context of a fourth amendment claim. *See Robins* v. *Harum*, 773 F.2d 1004, 1009 (9th Cir. 1985); *accord Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 870-72 (7th Cir. 1983). Similarly, the emergency seizure cases apply only to procedural due process claims. *See* note 7 *supra*.

[8] We agree that plaintiffs' claim is precluded by *Cassettari*, where we stated:

> Cassettari also argues that when the County took his property without paying him for it, the County violated his fourth amendment right to be secure against unreasonable seizures. This argument is without merit. A claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments.

Id. at 740 n.7. The claim plaintiffs alleged under the fourth amendment is, in fact, a taking claim which is properly asserted under the fifth amendment. The claim is unripe under *Williamson County*, 473 U.S. at 200.

Conclusion

The district courts' judgment as to the taking and fourth amendment claims are affirmed; the judgment as to the procedural and substantive due process claims are reversed. We remand for further proceedings consistent with this opinion.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINALOA LAKE OWNERS ASSOCIATION, et al.,
Plaintiffs/Appellants,

v.

CITY OF SIMI VALLEY,
Defendant/Appellee,
JAMES DOODY, et al.,
Defendants-cross-defendants/Appellees.

v.

DONALD G. TUDOR; JENNIE P. TUDOR, et al.,
Third-party-defendants/Appellees,
COUNTY OF VENTURA,
Defendant-third-party-plaintiff/cross-claimant.

No. 86-6425
D.C. No. CV-83-8220-ER

ORDER AND SECOND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
April 5, 1988—Pasadena, California

Filed January 6, 1989
Amended March 23, 1989
Second Amended Opinion August 9, 1989

Before: Melvin Brunetti, Alex Kozinski and David R. Thompson, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Constitutional Law

Appeal from judgment on the pleadings finding the case not ripe for decision in a 42 U.S.C. § 1983 suit alleging deprivation of fourth, fifth, and fourteenth amendment rights. Affirming the taking and fourth amendment claims, the court reversed and remanded the procedural and substantive due process claims holding that the government violated plaintiff's due process rights by failing to provide an opportunity for a hearing and by shrouding its decision in secrecy and deception precluded plaintiffs from taking advantage of available legal processes.

This case arises out of the Division Chief of the California Division of Safety of Dams (DSOD) defendant James Doody's decision to breach plaintiffs', Sinaloa Lake Owners Association, apparently unsafe dam. The dam was breached after plaintiffs were unsuccessful in obtaining a temporary restraining order. Plaintiffs filed suit under 42 U.S.C. § 1983 alleging deprivation of their fourth, fifth and fourteenth amendment rights. Defendants successfully moved for judgment on the pleadings, claiming that the case was not ripe for decision.

[1] In light of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of. [2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial. They offer nothing, however, to substan-

tiate this claim. [3] Nor is the court swayed by the alleged "reluctance of the California Supreme Court system to lend a sympathetic ear to private property owners in just compensation cases." [4] This court rejected defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. [5] Accepting plaintiffs' allegations as true, there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process. [6] After concluding that plaintiffs' substantive due process claim was ripe, [7] the court concluded that plaintiffs stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes. While defendants dispute these charges, this dispute cannot be resolved on a motion for judgment on the pleadings. [8] Finally, plaintiffs' taking claim under the fourth amendment is precluded by *Cassettari* v. *County of Nevada,* 824 F.2d 735, where this court stated that a claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments. The claim is unripe under *Williamson County.*

COUNSEL

Michael M. Berger and M. Reed Hunter, Fadem, Berger & Norton, Los Angeles, California, for the plaintiffs-appellants.

Walter G. Mortensen, Spray, Gould & Bowers, Ventura, California, for the defendant-appellee County of Ventura.

Henry J. Walsh and Carol A. Woo, Lawler, Bonham & Walsh, Ventura, California, for the defendant-appellee City of Simi Valley.

Joel A. Davis, Deputy Attorney General, Los Angeles, California, for the defendants-appellees Doody, Persson, Jacinto, Ley, Stephenson and McEwan.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court was advised of the suggestion for an en banc hearing, and a vote was taken. A majority of active judges having failed to vote for the suggestion, the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The opinion, published at 864 F.2d 1475 (9th Cir. 1989), is amended as follows:

On page 1480, footnote 4, line 6, change "*see* n. 3 *supra*" to "*see* note 3 *supra*".

On page 1483, second complete paragraph, insert the following footnote after the last sentence, following the words "due process.":

> 7. Defendants argue that plaintiffs were not denied procedural due process because plaintiffs had an informal hearing before a judge of the Superior

Court in attempting to obtain a temporary restraining order. If the facts are as plaintiffs allege, the rushed, off-the-record proceeding in which they participated does not satisfy due process under these circumstances. Due process requires notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong,* 380 U.S. at 552. Plaintiffs allege that DSOD officials did not tell them about the decision to breach until just hours before the event, although DSOD had made the decision much earlier. Also, they allege there was no emergency, so the breach could have been safely postponed to give plaintiffs an opportunity to avail themselves of state court processes.

At the hearing that afternoon, the judge refused to grant a TRO because plaintiffs did not produce an engineering study or testimony from an engineer showing that the dam was safe. Thus, as a result of alleged DSOD misbehavior, plaintiffs were unprepared to defend their rights in court. This is not due process. A few hours notice is as good as no notice at all when a meaningful court hearing requires plaintiffs to produce highly technical evidence.

On page 1484, fourth complete paragraph, insert the following footnote after the last sentence, following the word "situation.":

9. To the extent factual allegations made by plaintiffs are not entirely reflected in the complaint, plaintiffs can request leave to amend on remand. *See* Fed. R. Civ. P. 15(a); *United States* v. *Webb,* 655 F.2d 977, 979 (9th Cir. 1981).

On page 1485, first full paragraph, beginning on line 14, delete everything from "In determining whether . . ." to the end of the paragraph.

On page 1485, first full paragraph, line 14, after "due process." (now the end of the paragraph) insert the following footnote:

> 10. In *Graham* v. *Connor,* 109 S. Ct. 1865, 1870-71 (1989), the Supreme Court held that a claim of abusive governmental conduct that implicates a specific constitutional right must be analyzed as a violation of that right, rather than as a violation of substantive due process. As a result, cases like *Rutherford, Vaughan* and *Meredith* would today be treated as fourth and eighth amendment challenges. *Graham* does not, however, bar substantive due process analysis altogether. A plaintiff may still state a claim for violation of substantive due process where it is alleged that the government has used its power in an abusive, irrational or malicious way in a setting not encompassed by some other enumerated right. To that extent, our analysis in *Rutherford, Vaughan* and *Meredith* remains viable.

On page 1486, left-hand column, beginning on line 13, delete everything from "Generalizing the *Johnson* v. *Glick* . . ." to "481 F.2d at 1033." on line 24.

On page 1486, left-hand column, line 13, after the call to footnote 9 (now footnote 12), insert a paragraph break, and begin the next paragraph as follows:

> In determining whether substantive due process rights have been violated, we will look to such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was

taken in good faith or for the purpose of causing harm. *See Rutherford,* 780 F.2d at 1446; *Johnson* v. *Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973).[13]

The new footnote 13 reads as follows:

13. In *Graham,* 109 S. Ct. at 1869-71, the Court disapproved use of the *Johnson* v. *Glick* four-part test where the governmental conduct violates only a more specific constitutional guarantee. The test may still be applied, however, where, as here, the plaintiff alleges governmental abuse not covered by another constitutional standard.

On Page 1486, right-hand column, beginning on line 18, change the sentence beginning

"Whether government officials . . ." to the following: Whether government officials invoked emergency powers when they knew, or well should have known, that no exigency justified use of such draconian measures, is therefore highly relevant in determining whether the government has violated the plaintiff's substantive due process rights.

On page 1486, right hand column, line 34, after the call to footnote 10 (now footnote 14), insert the following:

This claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them.[15]

The new footnote 15 reads as follows:

15. Plaintiffs allege that, among other things, DSOD officials intentionally delayed telling them about the decision to breach the dam until just hours before the breach occurred. This was designed, plain-

tiffs claim, to prevent them from seeking the legal protection to which they were entitled. Again, it is no defense to this charge that plaintiffs had a hearing on the afternoon the dam was breached. Taking the facts as plaintiffs allege them, the hearing was meaningless, as plaintiffs had inadequate time to prepare; it cannot rebut the charge that DSOD officials deliberately attempted to prevent plaintiffs from resorting to available legal processes.

On page 1487, footnote 11 (now footnote 16), line 11, change "*See* note 7 *supra.*" to "*See* note 8 *supra.*"

OPINION

KOZINSKI, Circuit Judge:

We consider whether plaintiffs' fourth, fifth and fourteenth amendment claims are ripe for adjudication in federal court despite failure to exhaust state judicial remedies.

Facts

The complaint and stipulations of the parties set forth the following scenario:[1] Plaintiff Sinaloa Lake Owners Association owns Sinaloa Dam and Sinaloa Lake, the lake behind the dam. The individual plaintiffs own property surrounding the lake. The lake and the dam are located within the County of Ventura, outside the City of Simi Valley.

The California Division of Safety of Dams (DSOD), a division of the California Department of Water Re-

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[1]We treat the parties' stipulations as pro tanto amendments of the pleadings.

sources, is responsible for inspecting non-federally owned dams in California. On February 11, 1983, after conducting an inspection of Sinaloa Dam, DSOD sent a letter to James Stutzman, former president of the Association, directing the Association to take certain corrective actions and report back to DSOD no later than March 15, 1983.

Between February 25 and March 3, heavy rains raised the water level of Sinaloa Lake. On March 2, there were two slides on the face of the dam. Plaintiffs allege that these slides were caused by (1) a leak in a city-owned high-pressure water pipe running through the dam; (2) the county's actions in raising the dam's spillway, which allowed more water to accumulate behind the dam; and (3) the heavy rains. City officials immediately evacuated residents living below the dam and began pumping water out of the lake.

On March 3, defendant David Jacinto, a DSOD Associate Field Engineer, arrived at the dam and assumed control of the situation. He took additional steps to reduce the water level behind the dam. The Army Corps of Engineers inspected the dam and concluded it was stable.

On March 4, without advising plaintiffs, DSOD officials decided to breach the dam in order to drain the lake; this decision was not implemented immediately. By the next day, the water level was 10 to 12 feet below the high water mark. The city decided that the emergency was over, and advised evacuated residents to return to their homes.

On March 6, defendant James Doody, Division Chief of DSOD, countermanded the decision to breach the dam, and instead ordered workers to proceed with plans to lower the spillway. By March 8 the emergency was over: The water level was down 22 feet and DSOD promised to

maintain that level to enable the Association to maintain fish in the lake.

On March 10, at the direction of DSOD, workers began lowering the spillway in order to reduce the risk of future problems. By that time, however, defendant Doody and other senior officials of DSOD had once again decided to breach the dam. The plaintiffs were not advised of the latest decision until a few hours before DSOD contractors were scheduled to begin breaching the dam at 4:00 p.m. on Friday, March 11.

In an attempt to obtain a temporary restraining order, plaintiffs secured an informal hearing before a Superior Court Judge that afternoon. The judge refused to act, however, because plaintiffs were unable to produce a completed engineering study or testimony from an engineer showing that the dam was safe. DSOD produced no evidence indicating that the dam was unsafe. No order was entered and no record was made of the in-camera proceedings; apparently the matter was not even assigned a case number. Immediately after the hearing, DSOD's contractors breached the dam, lowered the water level 25 feet from the high water mark, and drained 90 percent of the water from Sinaloa Lake.

Plaintiffs filed suit under 42 U.S.C. § 1983 on December 16, 1983, alleging deprivation of their fourth, fifth and fourteenth amendment rights. Their second amended complaint was filed on July 2, 1984. On May 15, 1986, a month before the case was scheduled to go to trial, defendants moved for judgment on the pleadings, claiming that the case was not ripe for decision. The district court granted the motion as to all defendants. After their motion to amend the judgment was denied, plaintiffs timely appealed.

Discussion

We review the district court's grant of judgment on the pleadings de novo, taking all material allegations of the non-moving party as true and construing them in the light most favorable to that party. Judgment on the pleadings will not be granted unless "the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 604 (1969). Motions for judgment on the pleadings, like motions to dismiss for failure to state a claim, must be viewed with particular skepticism in cases involving claims of inverse condemnation. *See Hall* v. *City of Santa Barbara,* 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. denied,* 108 S. Ct. 1120 (1988).

I

Plaintiffs claim that defendants' actions in breaching the dam and destroying the lake amounted to a taking of their property without just compensation, in violation of the fifth amendment. Defendants argue, and the district court held, that this claim is not ripe because plaintiffs have failed to exhaust their state remedies.

Defendants rely on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172 (1985), which places two hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. First, *Williamson County* affirmed the principle that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. As we held in *Hall,* however, *Williamson County's* final decision requirement is inapplicable in

cases of physical invasion. 833 F.2d at 1282 n.28. A physical taking, such as the one at issue here, is by definition a final decision, and thereby satisfies *Williamson County's* first exhaustion requirement.

The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194-95. The Court reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation. *Id.*

Plaintiffs, citing footnote 28 of *Hall,* contend that the second requirement of *Williamson County* is also inapplicable to physical invasion cases. That footnote, however, only relieves plaintiffs of the obligation to exhaust administrative remedies in physical taking cases — it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.

Contrary to plaintiffs' assertions, this interpretation of *Hall* does not conflict with *Williamson County. Williamson County* only requires exhaustion of state judicial remedies when the state provides "an adequate process for obtaining compensation." 473 U.S. at 194. Plaintiffs need not bring a state court action when it would be futile under existing state law. *Williamson County,* 473 U.S. at 196-97; *Kinzli* v. *City of Santa Cruz,* 818 F.2d 1449, 1455 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 775 (1988); *Furey* v. *City of Sacramento,* 780 F.2d 1448, 1450 n. 1 (9th Cir. 1986). Although the alleged taking in *Hall* amounted to a

physical invasion, it was effected by a city ordinance. At the time the ordinance was passed, no action for inverse condemnation based on a regulatory taking could be brought under California law; the landowner's sole remedy was to seek invalidation of the offending statute. *See Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 274-77, 598 P.2d 25, 29-31, 157 Cal. Rptr. 372, 376-78 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980); *see also Furey,* 780 F.2d at 1450 n.1. Although the Supreme Court later expressly disapproved this aspect of California law, *see First English Evangelical Lutheran Church* v. *County of Los Angeles,* 107 S. Ct. 2378, 2387 (1987), the appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs. *See Williamson,* 473 U.S. at 194 ("all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' " exist *at the time of the taking*") (emphasis added; citations omitted).

[1] Unlike *Hall,* the taking here was effected by direct governmental action, not by an ordinance. California law has long provided a damages remedy for this type of taking claim. *See Holtz* v. *San Francisco Bay Area Rapid Transit Dist.,* 17 Cal. 3d 648, 652, 552 P.2d 430, 433, 131 Cal. Rptr. 646, 649 (1976); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d 1627, 1633-35, 236 Cal. Rtpr. 124, 127-29 (1987). Thus, plaintiffs can obtain compensation under state law, a remedy they have not taken advantage of.

[2] Plaintiffs argue that state remedies are inadequate because of the long delays before cases go to trial, and because of what they suggest is the California courts' longstanding hostility toward taking claims. They offer nothing to substantiate their claim that they will suffer unreasonable delay in state court, other than the bare assertion that their case would not go to trial for four

years or more. Such a generalized assertion falls far short of the evidence needed to show the futility of resorting to state courts for relief. Indeed, the published available data seems to paint a different picture. According to information provided by the Ventura County Superior Court to the Judicial Council of California, the median time between the filing of a complaint and trial in civil non-jury cases in 1987 was less than three years. *See* Letter from Jay S. Widdows, Administrative Assistant, Ventura County Superior Court to Alex Kozinski, Circuit Judge (July 22, 1988) (attaching data on median length of time for complaint-to-trial and at-issue memorandum-to-trial in Ventura County Superior Court).[2] Moreover, the time from filing to trial is not a particularly helpful measure of delay in a state like California, which allows a plaintiff up to three years from date of filing to effect service. Cal. Civ. Proc. Code § 583.210 (West Supp. 1988). A more meaningful measure of delay is the time between the filing of the at-issue memorandum and trial, since filing of the at-issue memorandum places the matter on the civil active list. Cal. Super. Ct. R. 209 (West Supp. 1988). That period was less than 8 months for civil nonjury trials and less than 10 months for civil jury trials in Ventura County in 1987. We cannot say that this delay is so excessive as to render resort to the state court system futile.

[3] Nor are we swayed by the alleged "reluctance of the California State Court system to lend a sympathetic ear to private property owners in just compensation cases." Appellants' Opening Brief at 29. California courts have held on similar facts that property owners are entitled to present their claims for just compensation to a

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[2]We take judicial notice of these figures, contained in the reports of a public body, pursuant to Fed. R. Evid. 201(b)(2).

jury. *See, e.g., Archer* v. *City of Los Angeles,* 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941) ("[i]n certain circumstances . . . the taking or damaging of private property [to safeguard public health, safety or morals] is not prompted by so great a necessity as to be justified without proper compensation to the owner"); *Rose* v. *City of Coalinga,* 190 Cal. App. 3d at 1635-36, 236 Cal. Rptr. at 128-29 (dispute over existence of emergency warranting destruction of private property and over grant of consent by owners to that act required dismissal of summary judgment); *Leppo* v. *City of Petaluma,* 20 Cal. App. 3d 711, 719, 97 Cal. Rptr. 840, 844 (1971) (damages appropriate where city failed to establish evidence of emergency justifying destruction of building). Plaintiffs do not explain why they fear that right will be denied them. We conclude that California provides plaintiffs an adequate procedure for obtaining just compensation.

Finally, plaintiffs assert that defendants are barred by laches from raising *Williamson County* as a defense.[3] Defendants respond that laches cannot bar their *William-*

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[3]Plaintiffs filed this lawsuit in December 1983, yet it was not until May 1986, one month before trial was to begin, that defendants first raised a ripeness challenge. It is clear they knew from the beginning that plaintiffs had not exhausted their state compensation remedies. Moreover, even before *Williamson County* was decided in June 1985, defendants were on notice that claims under the just compensation clause were not ripe until available state compensation remedies had been exhausted. *See Williamson County,* 473 U.S. at 194-95 (citing *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1013, 1018 n.21 (1984)).

The district court also expressed concern about this delay:

> [N]one of the defendants had ever moved to question the propriety of the case being here [in federal court] until here we are about one week before trial. I consider that to be dilatory and not in the best interest of the clients, necessarily. This request should have been raised at the outset in this case.

Reporter's Transcript, June 16, 1986, at 1-2.

son County defense because the failure to seek compensation in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction. *See Austin* v. *City and County of Honolulu,* 840 F.2d 678, 682 (9th Cir. 1988). We agree with defendants that ripeness is a jurisdictional requirement and lack of subject matter jurisdiction may not be waived.[4]

II

The due process clause protects individuals against governmental deprivations of property without due process of law. U.S. Const. amend. XIV, § 1. Plaintiffs contend that the DSOD's actions in breaching the dam and destroying the lake without providing plaintiffs adequate notice or a hearing amounted to a violation of due process.

[4] A. As a threshold matter, we reject defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court. This requirement, derived from "the special nature of the Just Compensation Clause," 473 U.S. at 196 n.14, states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking; it has no application to other types of constitutional claims, even where those

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[4]Although plaintiffs' taking claim is not ripe for our review, it would be entirely appropriate on remand for the district court, in the interest of judicial economy and particularly in view of defendants' undue delay in raising *Williamson County, see* note 3 *supra,* to permit plaintiffs to amend their complaint to include a pendent state law taking claim. *See, e.g., Rose* v. *City of Coalinga,* 190 Cal. App. 3d at 1633-35, 236 Cal. Rptr. at 127-29.

claims arise out of facts that also give rise to a taking claim.

Thus, the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process.[5] Indeed, the Supreme Court in *Williamson County* expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of post-deprivation remedies. *See* 473 U.S. at 195-96 n.14. It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. Accordingly, we reject the contention that *Williamson County* requires plaintiffs to seek relief in state court for the alleged violation of their right to due process.

Norco Construction, Inc. v. *King County,* 801 F.2d 1143 (9th Cir. 1986), and its progeny are not to the contrary. We held in *Norco* that a plaintiff's failure to obtain "a final determination on the status of the property" rendered his equal protection and due process claims unripe under *Williamson County. Id.* at 1145; *see also Shelter Creek Dev. Corp.* v. *City of Oxnard,* 838 F.2d 375, 379 (9th Cir. 1988); *Kinzli,* 818 F.2d at 1455-56. The holdings in these

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[5]We note that the Supreme Court was faced only with a taking claim in *Williamson County*; plaintiffs did not appeal the denial of their substantive and procedural due process and equal protection claims. 473 U.S. at 182 n.4. Although plaintiffs did argue that the due process clause forbids the exercise of police power that amounts to a taking, the Court held the claim unripe under the first *Williamson County* ripeness prong. The Court therefore did not need to reach the second *Williamson County* requirement that just compensation must first be sought through state procedures. 473 U.S. at 199-200.

cases are limited to *Williamson County's* first exhaustion requirement, which applies to all challenges to regulatory takings, whether based on the just compensation clause, the due process clause, the equal protection clause or the fourth amendment: Regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant governmental body. Once a final determination has been made, however, the mere fact that a taking is alleged does not create a further exhaustion requirement for non-taking claims.

Nor does *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987), teach otherwise. Although we stated in *Cassettari* that "[t]he Constitution . . . does not require a state to provide pre-taking notice [or] an opportunity to be heard," *id.* at 738, it is clear that we were speaking of the just compensation clause, not the due process clause. Indeed, our only support for this proposition was the Supreme Court's statement that " '[t]he *Just Compensation Clause* has never been held to require pre-taking process.' " *Id.* at 738-39 (quoting *Williamson County,* 473 U.S. at 196 n.14) (emphasis added). *Cassettari* certainly does not purport to hold, in contravention to long-established principles of due process, that the government need never provide process before depriving individuals of their property interests.

B. We turn to the merits of plaintiffs' due process claim. At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' *prior* to the deprivation of a significant property interest." *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 19 (1978) (empha-

sis added); *see Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299 (1981); *Fuentes* v. *Shevin,* 407 U.S. 67, 81-82 (1972); *Boddie* v. *Connecticut,* 401 U.S. 371, 378-79 (1971); *Tom Growney Equipment, Inc.* v. *Shelley Irrigation Dev., Inc.,* 834 F.2d 833, 835 (9th Cir. 1987). Only in extraordinary circumstances involving " 'the necessity of quick action by the State or the impracticality of providing any [meaningful] predeprivation process' " may the government dispense with the requirement of a hearing prior to the deprivation. *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) (quoting *Parratt* v. *Taylor,* 451 U.S. 527, 539 (1981)).

Defendants contend that *Parratt* v. *Taylor* forecloses the plaintiffs' due process claim. *Parratt* held that the deprivation of property "as a result of a random and unauthorized act by a state employee," 451 U.S. at 541, does not violate due process, so long as there is no showing that post-deprivation procedures for obtaining compensation are inadequate or "that it was precticable for the State to provide a predeprivation hearing." *Id.* at 543. Plaintiffs, however, do not allege that the injury to their dam was the result of the "random and unauthorized act of a state employee." All parties agree that the decision was made by senior DSOD officials under color of the authority vested in DSOD by California Water Code §§ 6100, 6102, 6110-12 (West 1971).[6] As we stated

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[6]Pursuant to these statutes, the DSOD supervises "the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof." Cal. Water Code § 6100, and "may in energency . . . [t]ake such . . . steps as may be essential to safeguard life and property." *Id.* § 6111.

in *Piatt* v. *MacDougall,* 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc):

> Where the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives, it makes no sense to say either that their conduct is "random" or that it is impossible for the state to provide a hearing in advance of the deprivation. The considerations underlying *Parratt* are simply inapplicable. . . .

Plaintiffs' claims are not barred by *Parratt.*

The principle announced in *Parratt* is not, however, the only exception to the general requirement of notice and an opportunity to be heard prior to the deprivation of property. The Supreme Court has repeatedly held that summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process. *See, e.g., Hodel* v. *Virginia Surface Mining & Recl. Ass'n,* 452 U.S. 264, 299-300 (1981); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 677-80 (1974); *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 599-600 (1950); *Yakus* v. *United States,* 321 U.S. 414, 442-43 (1944); *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306, 315-21 (1908). Breaching a dam so as to avoid the risk of disastrous flooding falls neatly into this "emergency action" category.

Plaintiffs contend that defendants are not entitled to rely on the emergency action defense because there was *in fact* no emergency, as should have been apparent from the fact that the lake was virtually empty when the dam was breached. Although there was no emergency at the

time the dam was breached, states are given "great leeway in adopting summary procedures to protect public health and safety," even in the absence of an emergency in the usual sense. *Mackey* v. *Montrym,* 443 U.S. 1, 17 (1979) (summary suspension of drivers refusing to take breath-analysis test). Because government officials need to act promptly and decisively when they perceive an emergency, no predeprivation process is due. *See Virginia Surface Mining,* 452 U.S. at 302-03; *North American,* 211 U.S. at 319-20.

Notwithstanding the deference accorded to officials exercising summary powers to protect the public, their power to declare an emergency and thus eliminate the constraints of the due process clause is not without bounds. *See, e.g., Virginia Surface Mining,* 452 U.S. at 302 n.46 (due process violations might arise if "a pattern of abuse and arbitrary action were discernible from review of an agency's administration of a summary procedure"). The rationale for permitting government officials to act summarily in emergency situations does not apply where the officials know no emergency exists, or where they act with reckless disregard of the actual circumstances. *Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-83 (1964) (need to avoid chilling effect on protected expression is satisfied by imposition of "actual malice" standard in libel cases involving public figures).

[5] As already noted, plaintiffs alleged that by March 8 the emergency was over. Yet, at the direction of the DSOD, workers began lowering the spillway on March 10; and on March 11 the dam was breached and the lake destroyed. Accepting plaintiffs' allegations as true — as we must on this review from the grant of a motion on the pleadings — there would seem to have been no justification for the DSOD's failure to give plaintiffs notice and

an opportunity for a hearing, however abbreviated. Plaintiffs have therefore stated a claim for denial of procedural due process.[7]

III

Plaintiffs next assert that, in breaching the dam, defendants violated their rights to substantive due process. We have recognized that the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. *See Smith* v. *City of Fontana,* 818 F.2d 1411 (9th Cir.), *cert. denied,* 108 S. Ct. 311 (1987). Defendants argue that plaintiffs' substantive due process claim is barred by *Williamson County* and

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[7]Defendants argue that plaintiffs were not denied procedural due process because plaintiffs had an informal hearing before a judge of the Superior Court in attempting to obtain a temporary restraining order. If the facts are as plaintiffs allege, the rushed, off-the-record proceeding in which they participated does not satisfy due process under these circumstances. Due process requires notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong,* 380 U.S. at 552. Plaintiffs allege that DSOD officials did not tell them about the decision to breach until just hours before the event, although DSOD had made the decision much earlier. Also, they allege there was no emergency, so the breach could have been safely postponed to give plaintiffs an opportunity to avail themselves of state court processes.

At the hearing that afternoon, the judge refused to grant a TRO because plaintiffs did not produce an engineering study or testimony from an engineer showing that the dam was safe. Thus, as a result of alleged DSOD misbehavior, plaintiffs were unprepared to defend their rights in court. This is not due process. A few hours notice is as good as no notice at all when a meaningful court hearing requires plaintiffs to produce highly technical evidence.

Parratt. Neither case is on point.[8] We have previously held that "substantive due process is violated at the moment the harm occurs [and therefore] the existence of a postdeprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." *Rutherford* v. *City of Berkeley,* 780 F.2d 1444, 1447 (9th Cir. 1986). Thus, *Parratt* is inapplicable to such claims, *see Smith* v. *City of Fontana,* 818 F.2d at 1414-15, as is the second ripeness prong of *Williamson County* (requiring exhaustion of state procedures for obtaining compensation). Moreover, the first ripeness prong of *Williamson County* (requirement of final decision), while applicable to most substantive due process claims arising out of alleged regulatory takings, *see Shelter Creek,* 838 F.2d at 379; *Kinzli,* 818 F.2d at 1456; *Norco Construction,* 801 F.2d at 1145, is not relevant to a physical taking claim because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation.

Defendants argue that special ripeness requirements nonetheless apply when substantive due process claims arise out of fact situations that also give rise to taking claims. They rely on *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo,* 841 F.2d 872 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 79 (1988), and *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987).

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[8]Nor is the emergency action exception to the normal requirement of predeprivation process, *see* pp. 15-17 *supra,* relevant in this context. *Virginia Surface Mining, North American* et al., considered whether some form of hearing is required before the government acts in emergency situations. This inquiry is unrelated to the separate question of whether the government's action violated substantive constitutional constraints, even though the government's decision was reached in a procedurally correct manner.

We do not agree. In *Lake Nacimiento* we held that *Parratt* barred what plaintiffs styled a substantive due process claim but was in fact a procedural due process claim involving "an attack on the decision-making process itself." 841 F.2d at 879. Plaintiffs here are challenging the defendants' decision, not merely the process by which it was reached. *Lake Nacimiento* is not controlling.

Cassettari is even less on point. That case limits its discussion of ripeness to fifth amendment taking claims. Indeed, in explaining why Cassettari's taking claim was unripe, we distinguished cases involving claims based on substantive due process and the fourth amendment. We observed that in those cases, in contrast to taking cases, "the deprivation of a federal right occurs regardless of the availability of a state remedy." 824 F.2d at 739. Neither *Cassettari* nor *Lake Nacimiento* speaks to a true substantive due process claim.

[6] Because we conclude that plaintiffs' substantive due process claim is ripe, we must next consider whether plaintiffs have stated a claim for relief. *See Alcaraz* v. *Block,* 746 F.2d 593, 602 (9th Cir. 1984) (court of appeals must affirm district court's grant of summary judgment if correct, even if reached for wrong reason). To establish a violation of substantive due process, the plaintiffs must prove that the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 395 (1926); *see Moore* v. *City of East Cleveland,* 431 U.S. 494, 498 n.6 (1977) (plurality opinion); *id.* at 514 (Stevens, J., concurring in the judgment); *Nectow* v. *City of Cambridge,* 277 U.S. 183, 187-88 (1928).

Plaintiffs allege that the decision to breach the dam was originally made on March 4, 1983, and reaffirmed on

March 10. Not only were these decisions kept secret without any legitimate reason, DSOD officials deceived plaintiffs with assurances that the dam would *not* be breached. Indeed, DSOD allegedly returned control of the lake to the plaintiffs at one point, promising to maintain the water level. In addition, plaintiffs allege that defendants well knew that the emergency was over by March 8, three days before defendants actually breached the dam. Plaintiffs thus claim that defendants breached the dam when they knew, or should well have been aware, that such an action was unjustified, and that they shrouded their decision in a veil of secrecy and deception wholly unjustified by the situation.[9]

A government entity's police and eminent domain powers go far beyond crisis management; the city certainly has the power to protect its citizens by breaching a dam it considers potentially, though perhaps not imminently, dangerous. But government power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm. *See Silverman* v. *Barry,* 845 F.2d 1072, 1080 (D.C. Cir.) ("[t]o succeed in a § 1983 suit for damages for a substantive due process . . . violation, a plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities"), *cert. denied,* 57 U.S.L.W. 3346 (U.S. Nov. 14, 1988) (No. 88-615); *Bello* v. *Walker,* 840 F.2d 1124, 1129 (3rd Cir.) ("deliberate and arbitrary abuse of government power violates an individual's right to substantive due process"), *cert. denied,* 109 S. Ct. 134 (1988).

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[9]To the extent factual allegations made by plaintiffs are not entirely reflected in the complaint, plaintiffs can request leave to amend on remand. *See* Fed. R. Civ. P. 15(a); *United States* v. *Webb,* 655 F.2d 977, 979 (9th Cir. 1981).

Our cases recognize that the due process clause places a substantive, as well as a procedural, limitation on the exercise of governmental power. In *Vaughan* v. *Ricketts,* No. 87-2526, slip op. 12943 (9th Cir. Oct. 14, 1988), for example, we considered the immunity from suit of a prison warden for digital rectal searches conducted by prison guards. The question of immunity, in turn, hinged on the warden's knowledge that the searches violated the Constitution. Digital rectal searches are clearly justified under certain circumstances. *See, e.g., United States* v. *Velasquez,* 469 F.2d 264 (9th Cir. 1972), *cert. denied,* 410 U.S. 945 (1973); *Rivas* v. *United States,* 368 F.2d 703 (9th Cir. 1966), *cert. denied,* 386 U.S. 945 (1967). In *Vaughan,* however, the prisoners claimed that the searches were conducted " 'maliciously and sadistically . . . for the purpose of causing harm,' " and accompanied by "joking and insults directed at the inmates . . . ." Slip op. at 12954. We concluded that the warden should well have known that the searches conducted in that fashion violated the prisoners' substantive due process rights.

We reached a similar conclusion in *Rutherford* v. *City of Berkeley,* 780 F.2d 1444, 1446 (9th Cir. 1986), and *Meredith* v. *Arizona,* 523 F.2d 481, 484 (9th Cir. 1975). In these cases, defendant police officers and prison guards were accused of unjustified brutality against suspects and prisoners. Government officials are, of course, justified in using force — even deadly force — in carrying out legitimate governmental functions. But, when the force is excessive, or used without justification or for malicious reasons, there is a violation of substantive due process.[10]

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[10]In *Graham* v. *Connor,* 109 S. Ct. 1865, 1870-71 (1989), the Supreme Court held that a claim of abusive governmental conduct that implicates a specific constitutional right must be analyzed as a violation of that right, rather than as a violation of substantive due

Police and prison guard brutality are among the most egregious abuses of governmental power. But the fourteenth amendment's due process clause protects property no less than life and liberty. U.S. Const. amend. XIV, § 1 ("[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"). To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional constraints.[11]

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process. As a result, cases like *Rutherford, Vaughan* and *Meredith* would today be treated as fourth and eighth amendment challenges. *Graham* does not, however, bar substantive due process analysis altogether. A plaintiff may still state a claim for violation of substantive due process where it is alleged that the government has used its power in an abusive, irrational or malicious way in a setting not encompassed by some other enumerated right. To that extent, our analysis in *Rutherford, Vaughan* and *Meredith* remains viable.

[11]As noted by Professor Norman Karlin, the freedoms granted by the bill of rights were cut from a single constitutional cloth:

> Rights were owned by the people, as individuals, and never dichotomized into personal and property. It was to the contrary. The principle established by the Magna Carta and thus basic to the common law and later to the Constitution was the identification of liberty and property. Ownership of property was evidence of liberty. In solemn ceremony, it was there decreed that neither the King nor government could take property except *per legem terrae*. The reach was not procedural but substantive. Coke in his writings used the phrase interchangeably with "due process of law;" and, in this form, the concept was included in the fifth amendment of the United States Constitution. Life, liberty and property comprised an invulnerable trilogy . . . .

Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 Sw. U.L. Rev. 627, 637-38 (footnotes omitted). *See also* Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty,* in Economic Liberties and the Judiciary 183, 200 (J. Dorn & H. Manne eds. 1987).

Justice Harlan expressed this view eloquently in *Poe* v. *Ullman,* 367 U.S. 497 (1961):

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .

Id. at 543, (Harlan, J., dissenting), *quoted with approval in Moore* v. *City of East Cleveland,* 431 U.S. at 502 (plurality opinion). As Justice Brennan aptly noted, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co.* v. *City of San Diego,* 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).[12]

In determining whether substantive due process rights have been violated, we will look to such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm. *See Rutherford,* 780 F.2d at 1446; *Johnson* v. *Glick,* 481 F.2d 1028, 1033 (2d

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[12]Although Justice Brennan (speaking for four Justices) dissented on procedural grounds, his substantive views apparently enjoyed the support of a majority of the Court. *See San Diego Gas,* 450 U.S. at 633-34 (Rehnquist, J., concurring) ("If I were satisfied [that the jurisdictional requirements had been met], I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.").

Cir.), *cert. denied,* 414 U.S. 1033 (1973).[13] To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power. *See Moore,* 431 U.S. at 520-21 (Stevens, J., concurring) (ordinance not shown to have substantial relation to public health, safety or morals, which cuts deeply into fundamental rights normally associated with ownership of residential property, violates substantive due process).

The exercise of emergency powers is particularly subject to abuse. Emergency decision-making is, by its nature, abbreviated; it normally does not admit participation by, or input from, those affected; judicial review, as this case illustrates, is often greatly curtailed or non-existent. Exigent circumstances often prompt actions that severely undermine the rights of citizens, actions that might be eschewed after more careful reflection or with the benefit of safeguards that normally constrain governmental action. *See generally* Karlin, 17 Sw. U.L. Rev. at 653-57. Whether government officials invoked emergency powers when they knew, or well should have known, that no exigency justified use of such draconian measures, is therefore highly relevant in determining whether the government has violated the plaintiff's substantive due process rights.

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[13]In *Graham,* 109 S. Ct. at 1869-71, the Court disapproved use of the *Johnson* v. *Glick* four-part test where the governmental conduct violates only a more specific constitutional guarantee. The test may still be applied, however, where, as here, the plaintiff alleges governmental abuse not covered by another constitutional standard.

[7] We conclude that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes.[14] This claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them.[15] While defendants dispute these charges, that

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[14]Although plaintiffs' allegations that the defendants failed to conduct statutorily required engineering studies or to inform them of their decision to breach the dam form the basis of their procedural due process claim, these allegations are also relevant to their substantive due process claim; indeed, it is almost inevitable that there will be some overlap between the allegations supporting both claims. As Judge Posner recently noted:

> the line between "procedure" and "substance" is hazy in the setting of the regulation of land uses. The denial of the plaintiffs' site plan without a full statement of reasons is what gives the denial such arbitrary cast as it may have, and thus lends color to the claim of irrationality, which is the substantive due process claim; but the failure to give reasons is also the cornerstone of the procedural due process claim. It is no good saying that if a person is deprived of property for a bad reason it violates substantive due process and if for no reason it violates procedural due process. Unless the bad reason is invidious or irrational, the deprivation is constitutional; and the no-reason case will sometimes be a case of invidious or irrational deprivation, too, depending on the motives and consequences of the challenged action.

Coniston Corp. v. *Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988).

[15] Plaintiffs allege that, among other things, DSOD officials intentionally delayed telling them about the decision to breach the dam

dispute cannot be resolved on a motion for judgment on the pleadings.

IV

Finally, plaintiffs allege that they were deprived of their right "to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures," in violation of the fourth amendment. U.S. Const. amend. IV. Defendants once again respond that plaintiffs' claim is not ripe.[16] They point to *Cassettari* v. *County of Nevada,* 824 F.2d 735 (9th Cir. 1987), where we rejected a taking claim purportedly based on the fourth amendment.

[8] We agree that plaintiffs' claim is precluded by *Cassettari,* where we stated:

> Cassettari also argues that when the County took his property without paying him for it, the County violated his fourth amendment right to be secure against unreasonable seizures. This argument is without merit. A claim for the taking by a state of

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until just hours before the breach occurred. This was designed, plaintiffs claim, to prevent them from seeking the legal protection to which they were entitled. Again, it is no defense to this charge that plaintiffs had a hearing on the afternoon the dam was breached. Taking the facts as plaintiffs allege them, the hearing was meaningless, as plaintiffs had inadequate time to prepare; it cannot rebut the charge that DSOD officials deliberately attempted to prevent plaintiffs from resorting to available legal processes.

[16] They also claim that *Parratt* and the emergency seizure cases, discussed pp. 15-16 *supra,* foreclose this claim. As we indicated above, however, *Parratt* is limited to procedural due process claims; it has no relevance in the context of a fourth amendment claim. *See Robins* v. *Harum,* 773 F.2d 1004, 1009 (9th Cir. 1985); *accord Wolf-Lillie* v. *Sonquist,* 699 F.2d 864, 870-72 (7th Cir. 1983). Similarly, the emergency seizure cases apply only to procedural due process claims. *See* note 8 *supra.*

> private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments.

Id. at 740 n.7. The claim plaintiffs alleged under the fourth amendment is, in fact, a taking claim which is properly asserted under the fifth amendment. The claim is unripe under *Williamson County,* 473 U.S. at 200.

Conclusion

The district court's judgment as to the taking and fourth amendment claims are affirmed; the judgment as to the procedural and substantive due process claims are reversed. We remand for further proceedings consistent with this opinion.

APPENDIX D

NO. CV 83-8220-ER(Mcx)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SINALOA LAKE OWNERS ASSOCIATION, INCORPORATED, a California corporation; ROBERT A. AIN; DIANTHA AIN; EDWARD T. BERGIN; RUTH M. BERGIN; EDWARD D. BIGENHO; CARYL BIGENHO; JUNIOUS W. BURRAGE; PEARL BURRAGE; ALAN T. CANFIELD; IRENE R. CANFIELD; GLORIA FRANKENBERG; HARMON FRANKENBERG; ROBERT A. GOOSEN; JUDITH A. GOOSEN; MALCOLM R. HARDING; PATRICIA I. HARDING; JOHN B. HAYES; JANET H. HAYES; W. L. HODSON; DOROTHY J. HODSON; WILLIAM J. HULL, JR.; DONNA R. HULL; C. R. JOSHI; REKHA C. JOSHI; H. REYNOLDS KERNBERGER; RONALD E. MEADOR; BARBARA A. MEADOR; BASIL H. MINNICK; WENDOLYN MINNICH; SHIRLEY E. NAJEMNIK; RICHARD D. PRICE; ELAINE D. PRICE; PETER J. SCHNETZLER; JANNICE M. SCHNETZLER; FRED N. SCHULTZ; DIANNE SCHULTZ; WILLIAM A. SEAMAN; JANE M. SEAMAN; E. DEAN SEYMOUR; JOSEPHINE SEYMOUR; GRACE SORRELS; RONALD J. SPARKS; MARY LOU SPARKS; DAVID L. STRATHEARN, JR.; JANET M. STRATHEARN; SANDRA STUTZMAN; AND JAMES STUTZMAN,

Plaintiffs,

v.

CITY OF SIMI VALLEY; COUNTY OF VENTURA; ROGER STEPHENSON; JAMES DOODY; V. H. PERSSON; DAVID JACINTO; J. E. LEY; S. S. MCEWEN; OFFICIALS OF THE DEPARTMENT OF SAFETY OF DAMS, STATE OF CALIFORNIA,

Defendants.

ORDER GRANTING JUDGMENT ON THE PLEADINGS FOR ALL DEFENDANTS

The Sinaloa Lake Owners Association, Inc. ("the Association") and homeowners who live around Sinaloa Lake sue the City of Simi Valley ("the City"), the County of Ventura ("the County"), and officials of the State of California Division of Safety of Dams ("state officials") under 42 U.S.C. Section 1983 ("Section 1983") alleging that defendants violated plaintiffs' rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The gravamen of plaintiffs' case is that the defendants wrongfully breached the Sinaloa Dam draining Sinaloa Lake diminishing the value and enjoyment of the homeowners' property. Additionally, as the basis for their § 1983 action against the City and County, plaintiffs contend the City and the County were negligent and caused weaknesses in the dam that led to the decision of the state officials to breach the dam.

The state officials and the City brought motions for judgment on the pleadings, joined in by the County, arguing that the case is not ripe for review as a Section 1983 action because remedies are available to plaintiffs in state court. The County also brought a separate motion for summary judgment arguing that there are no facts that would support a finding that the County was connected with the problems with the dam. The motions came before the court for oral argument on June 16, 1986. The court's tentative ruling was that the motions would be granted. The court now grants the motions for judgment on the pleadings.

I. FACTS

Starting March 11, 1983 and concluding March 16, 1983, Sinaloa Dam, an earthen dam, was breached on orders from the state officials. The events leading up to that action, all of which occurred in 1983, are as follows.

On February 11 the state officials sent a letter to the Association as the dam's owner detailing safety problems with the dam. In late February and early March there were heavy rains in the area around Sinaloa Lake. On March 2 a resident in the area noticed that saturated soil was falling away from a portion of the dam and City and County officials were notified. The dam was covered with plastic and an attempt was made to reduce the level of the lake. Hundreds of residents living below the dam were evacuated from their homes. On March 3 the state officials took charge of the site, the spillway was lowered and water was pumped out of the lake. By March 6 the level of the lake had fallen 14 feet from the high water mark.

On March 11, after determining that the dam was unsafe, the state officials made a decision to breach the dam to avoid the possibility of any future emergency conditions in the area. The Association was notified and immediately filed suit in state court to restrain the state officials from destroying the dam. A state court judge denied an application for a temporary restraining order after the Association indicated it had no expert testimony to counter the state's evidence that the dam was unsafe and that the Association would not indemnify the state for downstream property damage should the dam give way. Thereafter the dam was breached. On December 16, 1983 plaintiffs filed this action claiming that the actions of the state officials were unconstitutional. Plaintiffs also claimed that certain acts or omissions by the City and County (e.g. a leaking water pipe inside the dam and the paving of a road raising the spillway) caused weaknesses in the dam and ultimately were responsible for the need to breach the dam.

II. MOTIONS FOR JUDGMENT ON THE PLEADINGS

All defendants have moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). A motion for judgment on the pleadings can be granted when, assuming the allegations of the complaint to be true, defendants are entitled to a judgment as a matter of law. Defendants argue that plaintiffs cannot state a claim under Section 1983 because they have not pursued remedies available to them in state court. Plaintiffs concede they did not pursue their state remedies. Defendants rely on the recent Supreme Court decision *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 105 S.Ct. 3108 (1985) (hereinafter *"Hamilton Bank"*).

Plaintiffs proceed on three constitutional theories. First, that the breaching of the dam constitutes a taking of property without just compensation in violation of the Fifth Amendment ("inverse condemnation"). Second, that the acts of defendants constitute a taking of property without due process in violation of the Fourteenth Amendment. Third, that the breaching of the dam constitutes an unreasonable seizure in violation of the Fourth Amendment.

Particularly helpful in understanding the interrelationship between Fourth, Fifth, and Fourteenth Amendment claims in Section 1983 actions involving the destruction of property is Justice O'Connor's concurrence in *Hudson v. Palmer,* 104 S.Ct. 3194, 3206-07 (1984). That case, involving the intentional destruction of a prison inmate's property, examines the appropriate source of the constitutional right for destruction of property and the remedy that corresponds with it.

Before analyzing plaintiffs' inverse condemnation claim, it should be noted that plaintiffs still own the land in question and there is no current governmental interference in the use of the land. Plaintiffs are free to rebuild the dam and restore the lake. In this sense, this is a temporary taking case — plaintiffs seeking damages for temporary diminution in property values and the cost of rebuilding the dam.

A. The Inverse Condemnation — Fifth Amendment Claim

Plaintiff in *Hamilton Bank,* like the plaintiffs in this case, argued that intentional decisions of officials, acting under color of state law, amounted to a taking of property without just compensation in violation of the Fifth Amendment. The Supreme Court in *Hamilton Bank* concluded the question was not yet ripe for review because, *inter alia,* plaintiff had not sought compensation through the inverse condemnation procedures provided by the state. As the Court explained, "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action." *Hamilton Bank* at 3121 n. 13 (emphasis supplied). The court concluded, "[Plaintiff] has not shown that the inverse condemnation procedure [in state court] is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Id.* at 3122.

Plaintiffs in this action admit that they have not pursued their inverse condemnation remedies in state court, but argue they should not have to because there are no such remedies in California and because *Hamilton Bank*

involves a regulatory taking while plaintiffs' claim involves a physical invasion of property. Neither argument has merit.

1. State Remedies

Under the heading "California: Public Entity Paradise, Landowners' Purgatory," plaintiffs contend there are no adequate remedies available to them in state court. This is not correct. Inverse condemnation is a well recognized claim in California and landowners frequently recover money damages from governmental entities. *See e.g. Holtz* v. *BART,* 17 Cal.3d 648, 131 Cal.Rptr. 646 (1976) (plaintiffs recovered $30,000 for loss of lateral support due to excavation by BART). Perhaps the best example of the breadth of the inverse condemnation remedy in California courts is *McMahan's* v. *City of Santa Monica,* 146 Cal.App.3d 683, 194 Cal.Rptr. 582 (1983). There plaintiff claimed inverse condemnation because a city water main burst causing damage to plaintiffs' property. Plaintiff recovered damages under an inverse condemnation theory pursuant to Article I, Section 19 of the California Constitution. The court wrote, "Although inverse condemnation is a constitutional remedy, the liability of public entities for unintended physical damage to private property has evolved as a body of law primarily from the principles of tort and property law .... [While t]he principle of inverse condemnation will not subject a public entity to general tort liability[, i]nverse condemnation is the remedy ... for such injury to private property as results from a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole." *Id.* at 587 and 589 (citations omitted).

The alleged acts of the state officials in breaching the dam and the City and County officials concerning the

road and water pipe all were acts for public purposes and form the basis for a valid inverse condemnation claim under California law. Since such remedies exist in state court, no Fifth Amendment claim can be stated in this court at this time. *Cf. Furey* v. *City of Sacramento,* 780 F.2d 1448, 1450 n. 1 (9th Cir. 1986) (plaintiff had no remaining state remedies by which to secure compensation thus constitutional claim could be raised in federal court).

2. Facts of Hamilton Bank

The Association and homeowners, plaintiffs herein, argue that *Hamilton Bank* is distinguishable on its facts because it is a regulatory taking case and plaintiffs here are alleging a physical invasion of their property. The *Hamilton Bank* court assumed *arguendo* that regulatory actions of government substantially reducing the value of land, even if only temporarily, constitute a taking. Both this case and *Hamilton Bank* then involve claims of unconstitutional takings without just compensation in violation of the Fifth Amendment. In both cases an inverse condemnation remedy exists in state court. There is simply no meaningful difference between this case and *Hamilton Bank* on the point of law that is at issue in this case.

B. Due Process — Fourteenth Amendment Claim

Alternatively plaintiffs contend, in a very summary fashion, that if their Fifth Amendment taking claim is not ripe for review, they should be able to pursue their Fourteenth Amendment claim that they have been deprived of property without due process.

Plaintiffs do not appear to be [sic] have a procedural due process claim. They had a hearing before a state judge before they were deprived of their dam and also

have a right to post-deprivation inverse condemnation proceedings in state court.

Their due process argument, instead, appears to rest on the theory that defendants, particularly the state officials, invalidly exercised their police power in intentionally destroying the dam. "Historically [the] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property . . . [T]he Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e.g. Rochin* [v. *California,* 72 S.Ct. 205 (1952) (stomach pumping shocks the conscience)], it serves to prevent governmental power from being used for purposes of oppression." *Daniel* v. *Williams,* 106 S.Ct. 662, 665 (1986) (citations and quotation marks omitted) (emphasis supplied). In essence, plaintiffs due process argument is that the actions of defendants shock the conscience.

In *Hamilton Bank* the Supreme Court examined whether a land use regulation can be a valid exercise of the police power stretching so far as to destroy property rights, but concluded that the claim was premature. *Hamilton Bank* at 3124.

In *Hudson* v. *Palmer,* 104 S.Ct. 3194 (1984) the Court held that a random and unauthorized intentional destruction of property did not constitute a due process violation if adequate post deprivation state remedies existed, however the existence of a post-deprivation remedy does not bar a Section 1983 action if the deprivation is pursuant to

an established state procedure. *Logan* v. *Zimmerman Brush Co.,* 102 S.Ct. 1148 (1982).

The applicability of the *Hudson* and *Logan* cases to taking claims was discussed in a footnote in *Hamilton Bank.* 105 S.Ct. at 3122 n. 14. The court wrote that the holding in *Hamilton Bank* was analogous to the holding in *Parratt* v. *Taylor,* 101 S.Ct. 1908 (1984), *overruled in part, Daniels* v. *Williams,* 106 S.Ct. 662 (1986). In *Parratt,* the forerunner of *Hudson* and *Logan,* the court had held that the existence of an adequate post-deprivation remedy for deprivation of property meant that the deprivation of property was not without due process when the loss of property was due to a random and unauthorized act by a state official. The *Hamilton Bank* court noted that although the alleged taking of property was not random and unauthorized, the reasoning of *Parratt* still applied because of the special nature of the just compensation clause. *Id.* When it analyzed the due process argument, the Court did not rely on the *Parratt* reasoning.

Arguably then, the existence of a post-deprivation remedy does not make a due process claim unripe in an inverse condemnation case. This, in essence, is plaintiffs' argument in this case. But to allow an inverse condemnation claim proceed on a due process theory rather than a Fifth Amendment taking without just compensation theory would eviscerate the rule of *Hamilton Bank* and make every inverse condemnation claim a federal case with plaintiffs alleging, as here, that the taking shocks the conscience. The court does not believe that was the directive of the Supreme Court in *Hamilton Bank.*

Here Justice O'Connor's concurrence in *Hudson* v. *Palmer,* 104 S.Ct. 3194 (1984) is helpful. She analyzed the Fifth and Fourteenth Amendment arguments together to determine the "source of the constitutional right

[in deprivation of property cases] and the remedy that corresponds with it." *Id.* at 3205. "The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests .... The Constitution requires the Government, if it deprives people of their property, to provide due process of law and to make just compensation for any takings .... [I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate." *Id.* at 3206-07. Justice O'Connor would consider plaintiffs' due process and taking claims in this case as one, finding them both premature, which was the courts' conclusion in *Hamilton Bank*.

The major Ninth Circuit authority on the application of the *Parratt* (existence of post-deprivation remedies) rule is *Haygood* v. *Younger*, 769 F.2d 1350 (9th Cir 1985) (en banc) ("*Haygood*"). That opinion did not reach the question of "whether the availability of some remedial relief in state court might be imposed as a bar to federal relief under Section 1983 in the myriad [of] fact situations that might present themselves in other cases against state and local government officials." *Id.* at 1357. *Haygood* does offer some guidance. It rejects the rule that *Parratt* applies to deprivation of property but not deprivations of liberty, but notes that "[the Ninth] Circuit has not spoken with one voice" on the question. *Id.* at 1356. Instead the *Haygood* court adopts the rule that a balancing test is required to determine what pre- and post-deprivation process is due. *Id. citing Matthews* v. *Eldridge*, 96 S.Ct. 893 (1976).

Applying the balancing test to this case weighs against finding a constitutional deprivation here. First, unlike in

Haygood, plaintiffs here were given a pre-deprivation hearing in state court. While their dam was breached, they did have an opportunity to present evidence to an impartial decision maker prior to the breach. Second, the plaintiffs' property interest in their dam must be balanced against the state's interest in public health and safety including the life and property interests of the downstream residents. Despite the important interests of the dam owners, the state's interest in averting a major disaster must be considered paramount, meaning a pre-deprivation hearing is not constitutionally required. In such emergency situations, post-deprivation process such as a damage remedy in state court is constitutionally adequate.

There are a number of ways of analyzing plaintiffs' due process claim. As plaintiffs did not expound on their due process theory, it is not clear which mode of analysis plaintiffs are urging on the court. The court believes the existence of an apparently adequate state remedy in California makes both plaintiffs' taking claim and plaintiffs' due process claim premature. Should the processes in state court not compensate plaintiffs, plaintiffs' constitutional claims will then be ripe for review.

C. Fourth Amendment Claim

Plaintiffs' Fourth Amendment claim is without merit. As the Supreme Court has written, "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society." *Wolf* v. *Colorado,* 69 S.Ct. 1359, 1361 (1949). A seizure of a person's property in violation of the Fourth Amendment can create the basis for a damage claim under Section 1983, but the notion that the state officials in this case unreasonably seized the Sinaloa Dam and Lake is far-fetched. Every inverse condemnation

claim involves an alleged reduction in property value due to some change in land conditions. The heart of the *Hamilton Bank* opinion would be nullified if plaintiffs could get around the requirement to pursue state remedies by alleging a Fourth Amendment claim instead of a Fifth Amendment claim. Moreover, as Justice O'Connor explains in *Hudson* v. *Palmer,* 104 S.Ct. at 3206, the destruction (as opposed to seizure) of property is not a Fourth Amendment concern. It is properly a concern of the Fifth and Fourteenth Amendments.

III. CONCLUSION

Under the rule of *Hamilton Bank,* plaintiffs' Section 1983 action is not ripe for review. Plaintiffs should pursue their state court remedies. The motions for judgment on the pleadings are GRANTED.

The above ruling moots the summary judgment motion on the merits filed by the County. The court would note for the record that Plaintiffs' counsel appears to have abandoned his two prime theories of relief against the County — that the County paved a road raising the spillway increasing pressure on the dam and that the County increased the pressure in a water pipe in the dam. Prior to proceeding against the County in state court, plaintiffs should review the facts of their case against the County in the light of the discovery that has been done in this action.

The court's disposition of the motion for judgment on the pleadings also moots the counterclaims, cross-claims, and third party claims that have been filed by defendants for indemnification. Let judgment be entered accordingly.

Exercising its discretion under Federal Rule of Civil Procedure 54(d) and in light of the changes in the law

that occurred during the pendency of this action, the court orders that parties bear their own costs.

IT IS SO ORDERED.

The Court further orders the Clerk to serve copies of this Order on all parties by United States mail.

DATED: June 26, 1986.

EDWARD RAFEEDIE
United States District Judge

APPENDIX E

CALIFORNIA WATER CODE, §§ 6000-6157
(As in effect in March 1983)

(Unless otherwise noted, statutes are cited from West Annotated Cal. Codes, (1971), Vol. 68, pp. 591-615)

Division 3: DAMS AND RESERVOIRS

Part 1: SUPERVISION OF DAMS AND RESERVOIRS

Chapter 1: DEFINITIONS

§ 6000. Definitions

Unless the context otherwise requires, the definitions in this chapter govern the construction of this part.

§ 6002. Dam

"Dam" means any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either (a) is or will be 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, as determined by the department, if it is not across a stream channel or watercourse, to the maximum possible water storage elevation or (b) has or will have an impounding capacity of 50 acre-feet or more.

§ 6003. Barrier

Any such barrier which is or will be not in excess of six feet in height, regardless of storage capacity, or which has or will have a storage capacity not in excess of 15 acre-feet, regardless of height, shall not be considered a dam.

§ 6004. Structures excluded from definition of dam

No obstruction in a canal used to raise or lower water therein or divert water therefrom, no levee, including but not limited to a levee on the bed of a natural lake the primary purpose of which levee is to control floodwaters, no railroad fill or structure, and no road or highway fill or structure, no circular tank constructed of steel or concrete or of a combination thereof, no tank elevated above the ground, and no barrier which is not across a stream channel, watercourse, or natural drainage area and which has the principal purpose of impounding water for agricultural use or use as a sewage sludge drying facility shall be considered a dam. In addition, no obstruction in the channel of a stream or watercourse which is 15 feet or less in height from the lowest elevation of the obstruction and which has the single purpose of spreading water within the bed of the stream or watercourse upstream from the obstruction for percolation underground shall be considered a dam. [Stats. 1978, ch. 614, § 1]

§ 6004.5 Reservoir

"Reservoir" means any reservoir which contains or will contain the water impounded by a dam.

§ 6005. Owner

"Owner" includes any of the following who own, control, operate, maintain, manage, or propose to construct a dam or reservoir:

(a) The state and its departments, institutions, agencies, and political subdivisions.

(b) Every municipal or quasi-municipal corporation.

(c) Every public utility.

(d) Every district.

(e) Every person.

(f) The duly authorized agents, lessees, or trustees of any of the foregoing.

(g) Receivers or trustees appointed by any court for any of the foregoing.

"Owner" does not include the United States.

§ 6006. Alterations; repairs

"Alterations," "repairs," or either of them, mean only such alterations or repairs as may affect the safety of the dam or reservoir.

§ 6007. Enlargement

"Enlargement" means any change in or addition to an existing dam or reservoir, which raises or may raise the water storage elevation of the water impounded by the dam or reservoir.

§ 6008. Water storage elevation

Water storage elevation means that elevation of water surface which could be obtained by the existing dam or reservoir, as previously operated, were there no outflow and were the reservoir full of water.

Chapter 2: GENERAL PROVISIONS

§ 6025. Exclusive state regulation

It is the intent of the Legislature by this part to provide for the regulation and supervision of dams and reservoirs exclusively by the State.

§ 6026. Prohibition of regulation by city or county; definitions; exception

No city or county has authority, by ordinance enacted by the legislative body thereof or adopted by the people under the initiative power, or otherwise, to regulate, supervise, or provide for the regulation or supervision of any dams or reservoirs in this state, or the construction, maintenance, or operation thereof, nor to limit the size of any dam or reservoir or the amount of water which may be stored therein. This part shall not prevent a city or county from adopting ordinances regulating, supervising, or providing for the regulation or supervision of dams and reservoirs that (a) are not within the state's jurisdiction, or (b) are not subject to regulation by another public agency or body.

§ 6027. Compliance with state and federal requirements

Whenever supervision of safety of design or construction of a proposed or existing dam or reservoir is exercised by the United States or any of its agencies pursuant to a jurisdiction superior to that of the state, and the requirements made under authority of such jurisdiction are so contradictory with requirements made by the department under this part that a compliance cannot be made which will meet both federal and state requirements, then the state requirements shall be modified by the department sufficiently to make possible compliance with both federal and state requirements.

§ 6028. Immunity to liability

No action shall be brought against the state or the department or its agents or employees for the recovery of damages caused by the partial or total failure of any dam or reservoir or through the operation of any dam or

reservoir upon the ground that such defendant is liable by virtue of any of the following:

(a) The approval of the dam or reservoir.

(b) The issuance or enforcement of orders relative to maintenance or operation of the dam or reservoir.

(c) Control and regulation of the dam or reservoir.

(d) Measures taken to protect against failure during an emergency.

§ 6029. Duties and liabilities incident to ownership or operation

Nothing in this part shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations, or liabilities incident to the ownership or operation of the dam or reservoir.

§ 6030. Finality of department findings and orders

The findings and orders of the department and the certificate of approval of any dam or reservoir issued by the department are final and conclusive and binding upon all state agencies, regulatory or otherwise, as to the safety of design, construction, maintenance, and operation of any dam or reservoir.

§ 6031. Recourse to courts

Nothing in this part shall be construed to deprive any owner of such recourse to the courts as he may be entitled to under the laws of this State.

Chapter 3: ADMINISTRATIVE PROVISIONS

§ 6052. Employees

The department shall employ such clerical, engineering, and other assistants as are necessary for carrying on the

work of dam and reservoir supervision in accordance with this part.

§ 6053. Consultants

The department may employ consultants.

§ 6054. Consulting board

When the safety and technical considerations pertaining to a certificate of approval, dam, reservoir, or plans and specifications require it, or when requested in writing to do so by the owner, the department shall appoint a consulting board of two or more consultants to report to the department on the safety features involved.

§ 6055. Cost and expense of consulting board

The cost and expense of a consulting board if appointed on the request of an owner shall be paid by the owner.

§ 6056. Consulting board; report to director

The department shall retain a board of three consultants who shall make an independent report to the director upon the issuance, modification, or renewal of any certificate of approval for any dam owned by the department.

Chapter 4: POWERS OF THE DEPARTMENT

Article 1: POWERS IN GENERAL

§ 6075. Duties of department

The department, under the police power of the state, shall supervise the construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs for the protection of life and property as provided in this part.

§ 6076. Jurisdiction over dams

All dams and reservoirs in the state are under the jurisdiction of the department.

§ 6077. Departmental approval

It is unlawful to construct, enlarge, repair, alter, remove, maintain, or operate any dam or reservoir except upon approval of the department as provided in this part.

§ 6078. Rules and regulations

The department shall adopt and revise from time to time such rules and regulations and issue such general orders as may be necessary for carrying out, but not inconsistent with, the provisions of this part.

§ 6079. Cooperation with federal agencies

In carrying out the provisions of this part the department may cooperate with the United States or any of its agencies.

§ 6080. Entry on private property

In making any investigations or inspections required or authorized by this part the department or its representatives may enter upon private property as may be necessary.

§ 6081. Danger to life or property

In determining whether or not a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the department shall take into consideration the possibility that the dam or reservoir might be endangered by seepage, earth movement, or other conditions which exist or which might occur in any area in the vicinity of the dam or reservoir. Whenever the department deems that any such condition endangers a

dam or reservoir, it shall order the owner to take such action as the department determines to be necessary to remove the resultant danger to life and property.

Article 2: MAINTENANCE AND OPERATION

§ 6100. Supervision by department

Supervision over the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof is vested in the department.

§ 6101. Records and reports of owners

The department may require owners to keep records of, and to report on, maintenance, operation, staffing, and engineering and geologic investigations and shall issue such rules and regulations and orders as necessary to secure maintenance and operation and to require staffing and engineering and geologic investigations which will safeguard life and property. In addition, the owner of a dam or reservoir or his agent shall fully and promptly advise the department of any sudden or unprecedented flood or unusual or alarming circumstance or occurrence affecting the dam or reservoir.

§ 6102. Inspection by department

The department, from time to time, shall make inspections of dams and reservoirs at state expense for the purpose of determining their safety but shall require owners to perform at their expense such work as necessary to disclose information sufficient to enable the department to determine conditions of dams and reservoirs in regard to their safety and to perform at their expense other work necessary to secure maintenance and operation which will safeguard life and property.

Article 3: EMERGENCY WORK

§ 6110. Grounds for remedial measures

The department shall immediately employ any remedial means necessary to protect life and property if either:

(a) The condition of any dam or reservoir is so dangerous to the safety of life or property as not to permit of time for the issuance and enforcement of an order relative to maintenance or operation.

(b) Passing or imminent floods threaten the safety of any dam or reservoir.

§ 6111. Emergency powers

In applying the remedial means provided for in this article, the department may in emergency do any of the following:

(a) Lower the water level by releasing water from the reservoir.

(b) Completely empty the reservoir.

(c) Take such other steps as may be essential to safeguard life and property.

§ 6112. Duration of control

The department shall continue in full charge and control of such dam or reservoir, or both, and its appurtenances until they are rendered safe or the emergency occasioning the action has ceased.

§ 6113. Recovery of costs and expenses

The cost and expenses of the remedial means provided in this article, including cost of any work done to render a dam or reservoir or its appurtenances safe, shall be recoverable by the state from the owner by action brought by the department in the superior court of the county

wherein the dam or reservoir or any part thereof is situated.

Article 4: INVESTIGATIONS AND STUDIES

§ 6120. Dams, reservoirs, and appurtenances

For the purpose of enabling it to make decisions as compatible with economy and public safety as possible the department shall make or cause to be made such investigations and shall gather or cause to be gathered such data as may be needed for a proper review and study of the various features of the design and construction of dams, reservoirs, and appurtenances.

§ 6121. Watershed

The department shall also make or cause to be made such watershed investigations and studies as may facilitate its decisions.

Article 5: ACTION AND PROCEDURE TO RESTRAIN VIOLATIONS

§ 6150. Form of action

The department may commence an action or proceeding under this article, either by mandamus or injunction, for the purpose of stopping or preventing violations or threatened violations.

§ 6151. Grounds for commencing action

An action or proceeding under this article may be commenced whenever any owner or any person acting as a director, officer, agent, or employee of any owner, or any contractor or agent or employee of such contractor is:

(a) Failing or omitting or about to fail or omit to do anything required of him by this part or by any

approval, order, rule, regulation, or requirement of the department under the authority of this part; or

(b) Doing or permitting anything or about to do or permit anything to be done in violation of or contrary to this part or any approval, order, rule, regulation, or requirement of the department under this part.

§ 6152. Venue

Any action or proceeding under this article shall be commenced in the superior court in and for the county in which (a) the cause or some part thereof arose, (b) the owner or person complained of has its principal place of business, or (c) the person complained of resides.

§ 6153. Petition

Any action or proceeding under this article shall be brought by petition in the superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction.

§ 6154. Answer; temporary restraining order

The court shall specify a time, not exceeding 20 days after the service of the copy of the petition, within which the owner or person complained of shall answer the petition, and in the meantime the owner or person may be restrained.

§ 6155. Inquiry into case

In case of default in answer or after answer the court shall immediately inquire into the facts and circumstances of the case.

§ 6156. Joinder of parties

The court may join such parties as it deems necessary or proper in order to make its judgment, order, or writ effective.

§ 6157. Final judgment

The final judgment in such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On , I served the within Petition for Writ of Certiorari in re: "James J. Doody v. Sinaloa Lake Owners Association Inc." in the United States Supreme Court, October Term 1989, No. . . . , on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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The Honorable Edward Rafeedie
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U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, CA 94101

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 20th day of September, 1989, at Los Angeles, California.

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(2)

Supreme Court, U.S.
FILED
OCT 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES J. DOODY, et al.,
Petitioners,
vs.
SINALOA LAKE OWNERS ASSOCIATION, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ASSOCIATION, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Sinaloa Lake Owners Assn., et al. (the Property Owners), oppose the Petition filed by the policy-making officials of the California Department of Safety of Dams (DSOD policy-makers) and pray that the Petition be denied.

STATEMENT OF THE CASE

The facts on which the Court of Appeals for the Ninth Circuit based its ruling are set forth in that Court's opinion (App C to the Petition) and that statement is incorporated here.

A brief summary of the facts will suffice to describe the factual background and show that there is no need for this Court's intervention.

Fundamentally, this case is about the abuse of governmental power by the DSOD policy-makers.

The Property Owners, collectively, owned a private dam and lake. Individually, each owned a lakeshore home. Because of a question about the structure of the dam, the DSOD policy-makers ordered the Property Owners to investigate the dam's safety and reply to the DSOD policy-makers by March 15, 1983. (CR [Clerk's Record] 235A, p 10) At the time of this letter (February 10, 1983), the DSOD policy-makers acknowledged that they had made "no . . . modern engineering studies and evaluations . . . for key elements of this dam." (CR 222, p 9)

Notwithstanding that the DSOD policy-makers had told the Property Owners that they had until March 15 to report on the dam and actions (if any) needed to insure its safety, the DSOD policy-makers decided on March 4 to breach the dam. This decision was not communicated to the Property Owners. (CR 235A)

On March 9, one of the Property Owners heard a rumor that the DSOD policy-makers may have decided to breach the dam. (CR 282, p 33) In a telephone conversation with Petitioner Doody (Chief of the DSOD) on March 9, Petitioner Doody untruthfully said that no decision regarding breaching the dam would be made until March 11 (CR 282, p 33), even though the DSOD policy-makers had decided on March 4 to breach the dam (CR 235A).

On March 11, after 90% of the water had been drained from the lake, eliminating any emergency which the impounded water may have created, the DSOD

policy-makers told the Property Owners that they had decided to breach the dam. (CR 282, p 33)

At 4:00 p.m. on March 11 (a Friday afternoon), the Property Owners obtained an informal hearing before a State Superior Court judge to attempt to prevent the breach of the dam. However, because of the 8-day concealment of the decision by the DSOD policy-makers, the Property Owners were unable, in the short space of a few hours from notification to hearing, to obtain any expert testimony to support their request. The judge therefore took no action. (CR 235A, p 16)

At 5:00 p.m. on March 11, the DSOD's contractors began to breach the dam. (CR 235A)

It was this scenario which prompted the Court of Appeals to conclude:

> "We conclude that plaintiffs have stated a claim for a violation of substantive due process. Construed in the light most favorable to them, their allegations paint a picture of government officials bent on destroying the dam for no legitimate reason, and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes. This claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them." (Pet App C, p C-30; footnotes deleted.)

THE COURT OF APPEALS' OPINION WILL NOT "CHILL" LEGITIMATE GOVERNMENT ACTION

The argument by the DSOD policy-makers that the decision below will "chill" legitimate government action (Pet 16) or that all inverse condemnation plaintiffs will be able to allege facts to bring themselves within the rule of this case (Pet 12) would be ludicrous were it not from a State Attorney General. From that source, however, the argument itself is a chilling example of the kind of governmental conduct which led the Court of Appeals to its decision.

The arguments raised in the Petition need not detain this Court.

First. The holding that a procedural due process cause of action can arise from mistreatment of property owners by government agencies is in the mainstream of current judicial thought. In each of the following cases, for example, the court recognized the propriety of such a cause of action by a property owner:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1305;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 600;

Herrington v. County of Sonoma (9th Cir 1987)
857 F 2d 567;

Parks v. Watson (9th Cir 1983)
716 F 2d 646, 655-657;

Evers v. County of Custer (9th Cir 1984)
745 F 2d 1196, 1202;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.

Second. The "chilling effect" foretold by the DSOD policy-makers is a sham. As the facts of this case amply demonstrate, the opinion below was not based on ordinary governmental responses to emergency situations. Indeed, the opinion goes out of its way to note that it does *not* deal with ordinary governmental responses to emergencies:

> "To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power. *See Moore [v. City of East Cleveland]*, 431 U.S. at 520-21 (Stevens, J., concurring) (ordinance not shown to have substantial relation to public health, safety or morals, which cuts deeply into fundamental rights normally associated with ownership of residential property, violates substantive due process)." (Pet App C, p C-29)

Thus the opinion in this case speaks to the extraordinarily outrageous actions of the DSOD policy-makers, who proceeded in conscious disregard of the rights of the Property Owners and in a manner not justified by any emergency.[1] No government official reading the

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[1] The DSOD policy-makers' continuing reference to the "hearing" before a state trial judge before the dam was breached as though that "hearing" was meaningful in a due process sense (*e.g.*, Pet 17) is mystifying. As the Court of Appeals' decision makes clear, that "hearing" was a sham and a farce because the DSOD policy-makers lied to the Property Owners about their decision to breach the dam and concealed that decision until it was too late for the Property

(continued)

opinion in this case need be concerned about doing his duty. He need only be concerned about abusing his power.

THE COURT OF APPEAL'S DISCUSSION OF SUBSTANTIVE DUE PROCESS IS IN THE MAINSTREAM OF CURRENT JUDICIAL THOUGHT

In their effort to obtain total victory (rather than the partial affirmance granted by the Court of Appeals), the DSOD policy-makers assert that the Court of Appeals created some "vague new substantive due process theory . . . in property taking cases" (Pet 23), inconsistent with decisions of this Court and other Courts of Appeals.

Wrong.

Such an assertion can be made only by ignoring a substantial body of case law from this Court and other Courts of Appeals. For example, each of the following decisions notes the propriety of a cause of action under 42 USC §1983 for violation of a property owner's substantive due process rights:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1303;

(ftn. continued)
Owners to assemble the testimony needed to establish that breach was not necessary. (Pet App C, pp C-30-31, fn 15) It has long been settled that, to satisfy due process, a hearing must be held at a meaningful time and in a meaningful manner, so that the citizen has a fair opportunity to protect his rights. (*Mullane v. Central Hanover Bank & Trust Co.* [1950] 339 US 306; *Mennonite Board of Missions v. Adams* [1983] 462 US 791)

No government official should be "confus[ed]" (Pet 17) by an opinion which says that the government ought not lie and conceal.

Herrington v. County of Sonoma (9th Cir 1987)
857 F 2d 567;

Messick v. Leavins (11th Cir 1987)
811 F 2d 1439, 1442-1443;

Bello v. Walker (3d Cir 1988)
840 F 2d 1124, 1128-1129;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 603-608 [collecting numerous other citations];

Cunningham v. City of Overland (8th Cir 1986)
804 F 2d 1066, 1068;

Scott v. Greenville County (4th Cir 1983)
716 F 2d 1409, 1419;

Hammond v. County of Madera (9th Cir 1988)
859 F 2d 797;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.

In each of these cases except *Hammond* and *Messick*, the cause of action arose out of zoning or building permit disputes. In *Hammond*, the court held that governmental trespass stated a §1983 claim. In *Messick*, the court held that governmental destruction of private property stated a §1983 claim. Each case recognized the existence of a substantive due process cause of action. Because this Court has expressly noted that physical invasion cases (like *Hammond*, *Messick*, and the case at bench) are *more* likely to result in government liability than regulatory cases (like the other cited cases) (*e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 US 419, 426), the recognition of a cause of action for physical invasion is in harmony with established law.

Nor is there anything to the DSOD policy-makers' assertion that all inverse condemnation cases will be

transmogrified by clever pleading into substantive due process cases for the sole purpose of keeping them in federal court. (Pet 12) The tests applied to taking claims and substantive due process claims are not the same:

> "A substantive due process claim does not require proof that all use of the property has been denied [citation], but rather that the interference with property rights was irrational or arbitrary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 . . . (1976). Bateson was not required to seek 'just compensation' from state entities before bringing this substantive due process claim, and therefore this claim is ripe for adjudication. *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986)(because substantive due process is violated at the moment the harm occurs, the existence of post deprivation state remedies does not bar a §1983 action)." (*Bateson*, 857 F 2d at 1303)

Moreover, contrary to the DSOD policy-makers' claim, there is nothing strange or unique in a conclusion that, although a "taking" claim is not ripe, a substantive due process claim may be pursued. In each of the following cases, the court held that a taking claim was either not ripe or nonexistent, but nonetheless recognized the viability of a substantive due process claim:

Bateson v. Geisse (9th Cir 1988)
857 F 2d 1300, 1303;

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 603-608;

Scott v. Greenville County (4th Cir 1983)
716 F 2d 1409, 1419;

de Botton v. Marple Township (ED Pa 1988)
689 F Supp 477, 481.[2]

Lacking authority, the DSOD policy-makers concoct what they present as a *reductio ad absurdum* argument:

> "Since the Fifth Amendment itself contains a due process clause virtually identical to that of the Fourteenth Amendment, and the Fifth Amendment has not been interpreted to require pre-taking compensation [citation], it simply makes no sense to conclude, as the Ninth Circuit apparently has, that a taking of property without pre-taking process or notice is not an unconstitutional 'taking' if a state remedy is available, but that such a taking is nevertheless a substantive due process violation under the Fourteenth Amendment, irrespective of an available postdeprivation state remedy." (Pet 25, fn 12)

There are at least two things wrong with the DSOD policy-makers' proposition. *First*, the first half of their "equation" is wrong. The existence of a state remedy does not render the taking Constitutional, it merely renders federal litigation unripe. *Second*, the second half of their "equation" is wrong. It is not the "taking" which is "nevertheless" a violation of substantive due process, but the *pre*-taking actions (at bench, the DSOD policy-makers' lying about their actions and concealing their decision to breach the dam and thereby depriving the

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[2] *Herrington v. County of Sonoma* (9th Cir 1987) 857 F 2d 567 recognized a substantive due process cause of action even though the property owners abandoned their taking claim.

Property Owners of the opportunity for a meaningful predeprivation hearing). Thus, each half of the "equation" is legally incorrect. The two halves don't "equate" anyway.

Contrary to the argument in the Petition (Pet 23), the opinion below is consistent with this Court's decision in *Graham v. Connor* (1989) 490 US ___, 104 L Ed 2d 443. *Graham* was expressly addressed by the court below. (Pet App C, pp C-26-27, C-29) That analysis demonstrates that *Graham*, which requires analysis of police misconduct which violates the Fourth Amendment to be made under the Fourth Amendment, rather than under substantive due process, does not apply here. This is not, as the DSOD policy-makers would describe it, a simple Fifth Amendment taking case. As the Court of Appeals made clear, the prevarication and concealment engaged in by the DSOD policy-makers went *beyond* a Fifth Amendment taking case, and involved abuses of governmental power not controlled by specific protections in the Bill of Rights. (Pet App C, pp C-26-27, C-29)

Thus, the Court of Appeals' conclusion that the DSOD policy-makers' reprehensible conduct (aptly detailed in the opinion) stated a ripe cause of action for violation of substantive due process was grounded in precedent.

PARRATT HAS NEVER BEEN INTERPRETED AS BROADLY AS PRESENTED BY THE DSOD POLICY-MAKERS' PETITION

The most omnipresent charge in the Petition is that the Court of Appeals' opinion eviscerates this Court's decision in *Parratt v. Taylor* (1981) 451 US 527 as applied to real property cases in *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 US 172.

Wrong.

The DSOD policy-makers have an overblown fantasy about the expansiveness of the *Parratt* rule. No court has agreed with the DSOD policy-makers' analysis.

Numerous courts have held that *Parratt* does not apply to cases alleging violation of substantive due process:

Littlefield v. City of Afton (8th Cir 1986)
785 F 2d 596, 607;

Augustine v. Doe (5th Cir 1984)
740 F 2d 322, 327, 329;

Mann v. City of Tucson (9th Cir 1986)
782 F 2d 790, 792;

Gaut v. Sunn (9th Cir 1986)
792 F 2d 874, 876;

Smith v. City of Fontana (9th Cir 1987)
818 F 2d 1411, 1414;

Williams-El v. Johnson (8th Cir 1988)
872 F 2d 224, 228;

Gilmere v. City of Atlanta (11th Cir 1985)
774 F 2d 1495, 1500 (en banc).

As summarized in *Smith*:

> "Actions which violate these specific substantive protections of the Bill of Rights lie outside the scope of *Parratt* because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. Hence, *Parratt* is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights . . ." (818 F 2d at 1415)

See also Williams-El, 872 F 2d at 228; *Gilmere*, 774 F 2d at 1500.

The Fifth Circuit — evidently tiring of being told by government defendants that *Parratt* compelled the dismissal of all §1983 actions — expressed the thought in this pithy manner:

> "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. *Parratt* applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional provision." (*Augustine*, 740 F 2d at 329)

Nor does *Parratt* apply to all procedural due process cases. Where the government *could* provide a remedy but fails to do so, and the injury is caused by deliberate action, *Parratt* does not apply:

> "The defendants argue that under the Supreme Court's decision in *Parratt* . . . , due process is satisfied when the state provides a post-deprivation remedy. They contend Evers has an adequate post-deprivation remedy in the form of a tort action or quiet title action. *Parratt*, however does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process. [Citation.]" (*Evers v. County of Custer* [9th Cir 1984] 745 F 2d 1196, 1202, fn 6)

The Eighth Circuit reached the same conclusion in *Littlefield*:

> "A plaintiff has a right to a predeprivation hearing unless the action is random and unauthorized or the state cannot possibly provide a predeprivation hearing or the circumstances are those which the Supreme Court has recognized as excusing a predeprivation hearing. *E.g.* . . . (seizure of contaminated food). If the plaintiff has a right to a predeprivation hearing, then the inquiry proceeds to what type of predeprivation hearing is required. . . . State post-deprivation remedies cannot satisfy due process if a predeprivation hearing is required." (785 F 2d at 600)

These Court of Appeals decisions were firmly grounded in this Court's decision in *Hudson v. Palmer* (1984) 468 US 517, 534, in which this Court explained the *Parratt* rule as follows:

> "There we held that postdeprivation procedures satisfy due process because the state cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. *The controlling inquiry is whether the state is in a position to provide for predeprivation process.*" (Emphasis added.)

Here, the DSOD policy-makers were "in a position to provide for predeprivation process" within the meaning of *Hudson*. They had instituted such a procedure on February 10, 1983. They then short-circuited their own procedure by their decision to breach the dam 8 days before the actual breach, 8 days before notifying the Property Owners of that decision, and 12 days before the time for the Property Owners' report on the dam's structure. Plainly, the DSOD policy-makers used those 8 days to employ their independent demolition contractor so he could transport his equipment to the dam. If the demolition contractor could be given notice, so could the Property Owners. (The DSOD policy-makers have never denied this advance notification of the demolition contractor. Nor could they.) *Some* advance hearing was possible. *Some* effort to comply with the due process guarantees of notice and hearing (not to mention honesty and fair dealing with citizens) was possible. Yet, the DSOD policy-makers attempted none. Instead, they ambushed the Property Owners.

The Petition errs by reading more into *Parratt* than any court ever has. This Court summarized the law developed by *Parratt* and its progeny last Term:

> "Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression,' Davidson v. Cannon, supra, at 348 . . . ; see also Daniels v. Williams, supra, at 331 . . . (' " 'to secure the individual from the arbitrary exercise of the powers of government,' " ' and 'to prevent governmental power from being "used for purposes of oppression" ') (internal citations omitted); Parratt v. Taylor, 451 US 527, 549 . . . (Powell, J., concurring in result) (to prevent the 'affirmative abuse of power'). Its purpose was to protect the people from the State . . ." (*DeShaney v. Winnebago County Dept. of Soc. Services* [1989] 489 US ___, 103 L Ed 2d 249, 259)

CONCLUSION

The decision of the Court of Appeals is correct both as a matter of law and as a matter of justice. It requires the DSOD policy-makers to account to a trier of fact for their mistreatment of the Property Owners.

To date, the DSOD policy-makers have never given any explanation for their deceit and concealment. They — and the State's legal officers on their behalf — have simply stonewalled and denied that the Property Owners should have had any reason to expect fair treatment. With any respect due, that is not justice.

The *facts* are the determinative aspect of this case. And the facts show shameful Constitutional violations.

The Property Owners pray that the Petition be denied so that a trial on the merits may be had.

Respectfully submitted,

FADEM, BERGER & NORTON

MICHAEL M. BERGER
Counsel of Record

Attorneys for Respondents
Sinaloa Lake Owners Assn.,
Inc., et al.,

No. 89-473
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

James J. Doody, et al.,
Petitioners,
vs.
Sinaloa Lake Owners Association, Inc., et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On October 19, 1989, I served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

JOEL A. DAVIS
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010-2501

Also, one courtesy copy was sent to the following:

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That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Respondents herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On October 19, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

Notary Public in and for
said County and State

FILED
OCT 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-473

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

JAMES J. DOODY, et al.,
Petitioners,
vs.
SINALOA LAKE OWNERS ASSOCIATION, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners James J. Doody, S. S. McEwan, David J. Jacinto, J. E. Ley, V. H. Persson, and Roger Stephenson, respectfully reply to the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, as follows:

INTRODUCTION AND RESPONSE TO RESPONDENTS' STATEMENT OF THE CASE

The basic question before the Court in this case is whether a property owner aggrieved by the destruction of property by public officials acting under authority of state police power should be entitled to damages under 42 U.S.C. § 1983, although a state remedy is available, where

the action is allegedly unnecessary, arbitrary, and/or without advance notice.

There is no real dispute that an emergency situation arose at Sinaloa Dam on March 2, 1983. However, petitioners do not dispute that respondents' allegations that the emergency was over before the dam was breached on March 11, and that this action was arbitrary and unnecessary, must be accepted as true for purposes of the issues on appeal. The issues in this case are questions of law, not facts, and are well framed by the factual stipulations of the parties.

Nevertheless, respondents have made no real effort to meet the petition on the merits. As will be discussed, respondents' opposition neither denies the existence of a serious conflict among the circuits on the ripeness of due process claims in cases of this nature, nor provides a basis for harmonizing the Ninth Circuit decision with Supreme Court precedent. Instead, respondents have sought to create a blatantly false impression of the stipulated facts in a flagrant attempt to prejudice this Court through an ad hominem attack on the DSOD officials.

We submit that based upon the record here, the emergency was precipitated by the slides on March 2, 1983 during a week of heavy rain and related events — not before — resulting in the evacuation of residents of certain areas below the dam. We hasten to add that although for purposes of this proceeding, it is admitted that the emergency did not continue to exist on the day of the breach, still it must also be admitted that March 2 was the date of inception of the operative factors of the case. But respondents insinuate that the events leading up to the breach came into play before then by virtue of DSOD's sending the letter of February 10, 1983, to the lake owners. (Brief in Opposition, pp. 2 and 14)

As the opinion of the Ninth Circuit clearly indicates, that letter was simply the result of an earlier inspection of the dam by the DSOD pursuant to its regulatory authority. (Appendix C, pp. C-8, 9.) The letter ordered the lake owners, among other things, to restore the dam spillway to its previously approved condition and to investigate the dam's safety, and requested a reply to the DSOD by March 15, 1983. (SF 28, ER 235A.) Thus, for respondents to imply that the DSOD "short circuited its own procedures" in order to "ambush[ed] the property owners" (Brief in Opposition, p. 14) because the DSOD officials did not wait until March 15 to breach the dam, "as promised," but decided on March 4th to do so is nonsense, devoid of any support in this record and, until now, a charge never even intimated by the Ninth Circuit or respondents.

We see no necessity for further comment on the respondents' deceptive presentation of the facts, for as previously indicated and stated in the petition, this Court's resolution of the petition will be made on the record as to which there can be no material conflict. With that in mind, we will briefly respond to the arguments presented by respondents.

ARGUMENT

I

THE NINTH CIRCUIT DECISION REFLECTS AN ERRONEOUS MINORITY INTERPRETATION OF *PARRATT*

The Ninth Circuit's error in concluding that the DSOD officials' acts were not "random and unauthorized" for purposes of applying *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny was extensively discussed in the

petition. Respondents have responded primarily by repeatedly referring to petitioners as "DSOD policy-makers." This often echoed characterization begs the question. As discussed in the petition and *Easter House v. Felder,* 879 F.2d 1458 (7th Cir. 1989)(en banc), the majority of circuits that have considered the question have concluded that the mere fact that a public employee has a high level position, even one which includes policy-making, does not in itself make the deprivation foreseeable to the *state* and the result of "an established state procedure." As the *Easter House* court stated:

> "The inquiry which the Supreme Court deems relevant is whether the employee's actions were random and unauthorized *from the state's perspective,* not whether the employee held any certain position in the governmental hierarchy." (879 F.2d at 1472 (emphasis added).)

Nonetheless, respondents disingenuously assert that the DSOD had instituted a procedure for providing predeprivation process within the meaning of *Hudson v. Palmer,* 468 U.S. 517 (1984) via the February, 1983 letter, but had "... then short-circuited their own procedure by their decision to breach the dam ... 12 days before the time for the Property Owners' report on the dam's structure...." (Brief in Opposition, p. 14.)

The respondents again attempt to mislead this Court in discussing in the context of the "practicability of predeprivation due process" only the February, 1983 DSOD order that resulted from the earlier inspection of Sinaloa Dam, without even mentioning the intervening emergency that began March 2. As previously indicated, the inspection was conducted pursuant to the DSOD's statutory duties to supervise dams in the State, and the inspection discovered potentially serious problems with

the stability and maintenance of the dam. Pursuant to its supervisory authority, following the inspection the DSOD ordered the property owners to take corrective action and to respond. This order was undeniably totally separate and unrelated to the subsequent emergency triggered March 2.

Respondents have not seriously disputed that there is a significant circuit conflict concerning the issues raised in the petition. Nor have they substantively addressed the Ninth Circuit's flawed interpretation of the limitations on *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny imposed by the "established state procedure" exception, other than to assert erroneously that a due process claim may be stated despite *Parratt* since the DSOD officials (as opposed to the state) could have provided notice and a hearing before the breaching of the dam.

Respondents have cited six cases in arguing that the Ninth Circuit's decision reinstating the lake owners' procedural due process claim is in "the mainstream of current judicial thought." (Brief in Opposition, p. 4.) None of these cases involve use of the emergency police power.[1] Ironically, four of these decisions are also from the Ninth Circuit. The only decision cited from another circuit court of appeals is the Eighth Circuit decision in *Littlefield v.*

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[1]The most recent case on point is *Miller v. Campbell County, Wyoming,* ____ F.Supp. ____, 1989 U.S. Dist. Lexis 11685 (D. Wyo. 1989) (10/2/89, Docket No. C88-0194J) where the Court was faced with an analogous situation in which a property owner was evacuated and barred from his business property as the result of an evacuation ordered by the county due to a gas leak. The Court, citing *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306, 315-321 (1908) concluded that even if an emergency did not exist at the time the order was made, the postdeprivation remedy in inverse condemnation satisfied due process.

City of Afton, 785 F.2d 596 (8th Cir. 1986). However, the *Littlefield* Court's conclusion, with little elaboration, that the deprivation of due process in connection with plaintiff's application for a building permit was the result of an "established state procedure" is questionable in that the opinion suggests that the Afton City Council *exceeded* its statutory grant of discretion under state law. (785 F.2d at 602.) Furthermore, the *Littlefield* decision is not only in apparent conflict with decisions of other circuits, but also evidence that the Eighth Circuit itself has not spoken with one voice. (See *Birkenholz v. Sluyter,* 857 F.2d 1214, 1216-17 (8th Cir. 1988).) As discussed in the petition, the Ninth Circuit's holding is definitely not within the mainstream of current § 1983 jurisprudence. It is in conflict with, and the case should be controlled by, the well reasoned decision in *Easter House, supra,* and cases discussed therein.

II

THE SUBSTANTIVE DUE PROCESS ANALYSIS OF THE NINTH CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS, AND IN NEED OF SUPREME COURT REVIEW

The respondents apparently want to have it both ways. On one hand, they bemoan the DSOD's failure to give supposed constitutionally adequate notice and opportunity for a predeprivation hearing. On the other hand they insist that a substantive due process claim can be stated, notwithstanding *Graham v. Connor,* 490 U.S. ____, 104 L.Ed.2d 443 (1989), based upon the alleged pretaking concealment of the decision to breach the dam which deprived respondents of the opportunity for hearing. Respondents baldly state that:

> "It is not the 'taking' which is 'nevertheless' a violation of substantive due process, but the *pre*-taking actions (at bench, the DSOD policy-makers' lying about their actions and concealing their decision to breach the dam and thereby depriving the Property Owners of the opportunity for a meaningful predeprivation hearing)." (Brief in Opposition, pp. 9-10.)

This argument, like the analysis in the Ninth Circuit decision, is circular and flawed in at least two respects. First, the supposed "substantive" due process claim is in fact an alleged denial of respondents' opportunity for procedural due process. Should this analysis stand, virtually every procedural due process claim would ipso facto also be pleadable as a substantive due process violation. Second, this analysis flies in the face of the Supreme Court's mandate in *Graham.* Contrary to respondents' (and the Ninth Circuit's) conclusion that the allegations of the property owners involve alleged governmental abuses "not controlled by specific protections in the Bill of Rights" (Brief in Opposition, p. 10), the claim clearly invokes the specific provisions of procedural due process as well as the express proviso of the Fifth Amendment just compensation clause. Therefore, under *Graham,* the claim should be analyzed under the specific constitutional standard of those amendments, not under the subjective due process criteria formulated by the Ninth Circuit. As discussed in the petition, the Ninth Circuit's reliance on substantive due process was clearly erroneous. When the claims are properly analyzed under the Fifth and Fourteenth Amendments, it is clear that a procedural due process claim is not ripe and that a substantive due process claim cannot be stated, as a state law remedy is available for the alleged "taking."

The cases cited by respondents are either also from the Ninth Circuit, are questionable following recent Supreme Court action, or serve to underscore further the conflict among the circuits concerning the application of the *Parratt* doctrine to, and the availability of, a substantive due process claim in property taking cases where an adequate state remedy exists. In particular, cases such as *Augustine v. Doe,* 740 F.2d 322 (5th Cir. 1984), *Williams-El v. Johnson,* 872 F.2d 224 (8th Cir. 1988) and *Gilmere v. City of Atlanta,* 774 F.2d 1495 (11th Cir. 1985) (en banc), involving excessive force, almost certainly have been overruled by *Graham.*

A number of circuits have flatly rejected substantive due process analysis in property taking cases, (see petition, pp. 25-26), or like the Seventh Circuit, have held that an arbitrary interference with property alone is insufficient to give rise to a substantive due process claim unless the state remedy is inadequate or there has been a violation "... of some other substantive constitutional right." (*Polenz v. Parrott,* 883 F.2d 551, 558 (7th Cir. 1989).)

Respondents cite *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983) to bolster their position, but a careful reading of that decision indicates that the Court's discussion concerned procedural, rather than substantive, due process. Furthermore, *Messick v. Leavins,* 811 F.2d 1439 (11th Cir. 1987), also cited by respondents, confined its discussion to an apparent procedural due process claim and is itself questionable in light of the granting of certiorari in another Eleventh Circuit decision that similarly interpreted *Parratt.* (*Burch v. Apalachee Community Mental Health Service,* 840 F.2d 797 (11th Cir. 1987) (en banc), cert. granted sub. nom. *Zinermon v. Burch,* No. 87-1965.) Like *Zinermon,* the present case involves an

important issue, likely to recur, that goes to the heart of the state government-federal judiciary relationship. The petition should be granted.

CONCLUSION

The aftermath of the recent tragic earthquake in Northern California is illustrative of the potential consequences of the Ninth Circuit's decision on the ability of government to respond effectively to actual or perceived emergencies. Dozens, if not hundreds of buildings in hard hit areas were or will soon be condemned by city building inspectors. Many have been or will be torn down as safety hazards and to facilitate clean-up operations, with owners and tenants allowed little time to salvage belongings. Under the present decision, any aggrieved property owner (or occupant) who later chooses to dispute the necessity for condemning and demolishing his or her building would be able to do so in a § 1983 action by alleging that the action in that particular case was arbitrary and that he or she was denied adequate notice and a meaningful hearing prior to demolition.[2] This would be the case even though California recognizes a property owner's right to seek damages against a government entity in such circumstances. (*Rose v. City of Coalinga,* 190 Cal.App.3d 1627, 236 Cal. Rptr. 124 (1987).)

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[2]See e.g. the pre-*Parratt* case *Poage* v. *City of Rapid City,* 431 F.Supp. 240 (D.S.D. 1977) in which a § 1983 suit was brought as a result of the city dulldozing a number of buildings damaged in a flood.

The Ninth Circuit decision is an invitation to an unwarranted federalization of state property litigation, and imposition of an intolerable burden upon public emergency officials. The petition for writ of certiorari should be granted.

Dated: October 31, 1989

Respectfully submitted,

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STATE OF CALIFORNIA }
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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 1, 1989, I served the within Reply to Brief in Opposition to Petition for Writ of Certiorari in re: "James J. Doody v. Sinaloa Lake Owners Association, Inc." in the United States Supreme Court, October Term 1989, No. . . . , on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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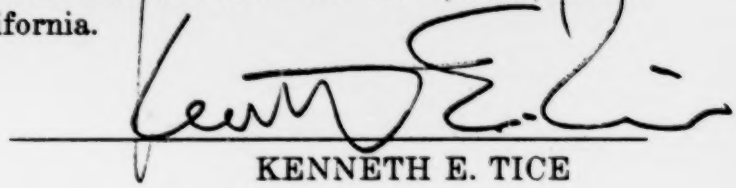
All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 1, 1989, at Los Angeles, California.



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